TL6626

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Amnesty International & Judicial System Monitoring Programme

Indonesia & Timor-Leste

Justice for Timor-Leste: The Way Forward

AI Index: ASA 21/006/2004

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM

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April 2004 **Summary** **AI Index: ASA 21/006/2004**

Following the extreme violence that took place during the period surrounding the vote for independence of August 1999 in the Democratic Republic of Timor-Leste (Timor-Leste, formerly known as East Timor),[1] two separate processes for investigating, prosecuting and judging the crimes committed during this period were set in motion, one in Indonesia and one in Timor-Leste itself. In both countries, legislation was put in place specifically to create institutions and a legal framework in which these processes could take place.

After a slow start in Timor-Leste there has been a steady build-up of momentum in the work of the Serious Crimes Unit (SCU) and the Special Panels set up by the United Nations (UN) to investigate and try those indicted for crimes committed in 1999. Their chances of completing their task, however, are extremely remote: their work is hampered by limited capacity and the lack of cooperation of the Indonesian authorities and by the uncertain commitment of the Timor-Leste government and the UN to continuing the process.

The parallel process in Indonesia, where for the first time specially-constituted Human Rights Courts heard the cases of persons accused of responsibility for some of the most egregious cases of violence, has all but come to an end. Six people were

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[1] For the sake of consistency the new name "Timor-Leste" will be used throughout this report except in cases where East Timor is used as part of a formal title or in a quotation.

found guilty of crimes against humanity and sentenced to terms of imprisonment of between three and 10 years. Only the appeals remain to be heard.

Even before the trials in Indonesia began there had been doubts about the capacity of a process that was so heavily circumscribed in its scope to deliver truth and justice. The inadequacies of the trials that have since taken place have only confirmed these doubts.

Nevertheless the processes are significant for two key reasons. First, the trials in Indonesia, however imperfect, represent a first attempt by the Indonesian authorities in what is intended to be an ongoing process of bringing to trial persons charged with crimes against humanity in a range of different cases. Second, the shortcomings of the process in Indonesia, together with the uncertainties surrounding the future of the process in Timor-Leste, throw the spotlight back on the international community and its responsibilities in such situations.

The following report on the two processes has been compiled by Amnesty International and the Judicial System Monitoring Programme (JSMP).[2] It is based on close observation of trials in both Indonesia and Timor-Leste, including the monitoring of the first three trials in *ad hoc* Human Rights Court on East Timor in Jakarta by a JSMP trial observer.[3]

The two organizations believe that a critical juncture has been reached in the process. On the Indonesian side, the problems with the *ad hoc* Human Rights Court in Jakarta were so serious, and most, if not all of the results so unsatisfactory, that any further progress cannot be expected until such a time when the problems in the current system have been corrected. Indonesia has also so far refused to transfer to Timor-Leste for trial individuals indicted there. The numbers of people involved are not insignificant: as of early December 2003, 281 of the 369 persons indicted in Timor-Leste were at large in Indonesia. Among them are senior military and police officials, some of whom remain in active service.

On the Timor-Leste side, there is still considerable work to be done. The mandate of UN Mission of Support in East Timor (UNMISET), on which the SCU and Special Panels are heavily dependent, ends in May 2004. It is unlikely that hearings into all cases in which there are already indictments will have been completed by this time. Moreover, only around one half of the estimated 1,400 murders committed in 1999 will have been investigated. Numerous cases of torture, rape and other crimes of sexual violence, forced deportation, destruction of property and other crimes will also remain outstanding.

While there is clearly a need for the work of the SCU and Special Panels to continue, ultimately the ability of the judicial process in Timor-Leste to deliver full accountability remains limited by the lack cooperation from Indonesia and, to a lesser extent, the immaturity and lack of resources of Timor-Leste's nascent justice system. Resolving the former will require a reversal of attitudes among the Indonesian authorities towards prosecutions of human rights violations. The latter will require the continuation of major international support to rebuild the criminal justice system in Timor-Leste.

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[2] JSMP was set up in early 2001, in Dili, Timor-Leste. It undertakes court monitoring and provides legal analysis and thematic reports aimed at contributing to building and strengthening of Timor-Leste's justice system.

[3] JSMP had independent legal observer at the first three trials. It was supported in this work by the International Platform of Jurists for East Timor (IPJET).

If there is to be no impunity with respect to crimes committed in Timor-Leste, the international community must now fulfil the commitment it made, including in resolutions by the UN Security Council[4] and the UN Commission on Human Rights,[5] to ensure that the perpetrators are held to account. Careful consideration of all possible options is required.

A first practical step would be to establish an independent Committee of Experts to review the processes in both Indonesia and Timor-Leste. The purpose of such a review would be to evaluate the progress of investigations and prosecutions; to identify the technical and political obstacles to the process; and to make recommendations to the UN Security Council on what further measures are required to ensure that credible and effective investigations and trials take place within the shortest possible time.

As a starting point a review should look at what further can be achieved through the serious crimes process in Timor-Leste. However, unless Indonesia changes its position on cooperation, other judicial mechanisms will be required. An international criminal tribunal, as recommended by the UN appointed International Commission of Inquiry (ICIET), is among the other options that must be considered. Trials in third countries might also supplement or provide an effective alternative.

Whatever judicial mechanism or mechanisms are established they should be informed by the following three objectives:

- All those responsible for committing crimes in Timor-Leste in 1999, and eventually for the whole period of Indonesia's occupation, should be brought to justice. Every crime should be thoroughly, independently and impartially investigated and, where there is sufficient admissible evidence, prosecuted.

- The rights of suspects and accused to a fair trial should be fully respected at all stages of the proceedings.

- The right of victims and their relatives to full reparations, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition should be guaranteed and they should have effective means to obtain such reparations. Where reparations require expenditure, sufficient funds must be made available.

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[4] Resolution 1264 (1999), S/RES/1264, 15 September 1999 and Resolution 1272 (1999), S/RES/1272, 25 October 1999.

[5] Resolution adopted by the Special Session on East Timor of the UN Commission on Human Rights. UN Doc.E/CN.4/S-4/l.1/Rev.1. 24 September 1999.

In ensuring these objectives are achieved, Amnesty International and JSMP make the following recommendations:[6]

To the UN Security Council

- An independent review should be established to evaluate the progress of judicial proceedings in both Indonesia and Timor-Leste.

- Ensure that there is an explicit mandate for continuing support to the SCU and Special Panels in Timor-Leste beyond the end of UNMISET's mandate. This process should not end until it has completed, as far as is possible, the task with which it has been mandated or there is an effective and credible process to replace it.

- The Special Panels, an international tribunal and/or any other justice mechanism established to resolve the crimes committed in Timor-Leste, must be provided with sufficient and sustained funding to carry out its mandate in accordance with the highest international standards.

- Pressure should be applied on Indonesia to cooperate with the serious crimes process in Timor-Leste, including by transferring for trial by the Special Panels individuals who have been indicted by the Timor-Leste General Prosecutor

- Continued support should be provided to strengthening Timor-Leste's criminal justice system, including the Special Panels.

To the Indonesian government

- Enforce the sentences handed down by the *ad hoc* Human Rights Court on East Timor.

- Cooperate fully with judicial proceedings being conducted in Timor-Leste, including by extraditing suspects against whom there are indictments to Timor-Leste or to other states able or willing to prosecute and punish crimes against humanity, war crimes and other serious crimes in fair trials without the death penalty.

- Suspend from active duty all military or police officers who have been indicted by the Timor-Leste Prosecutor General pending the outcome of criminal proceedings to determine whether or not they are guilty of the charges.

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[6] For more detailed recommendations see Section 13.

- The Indonesian law and procedures under which cases relating to 1999 events in Timor-Leste were investigated and prosecuted should be reviewed so that they are fully consistent with international law and standards. Such reform is required so that in future investigations and prosecutions of cases involving crimes against humanity and other crimes under international law are conducted in a manner consistent with international law and standards.

To the Timor-Leste government

- Fulfil its duty to bring to justice perpetrators of crimes under international law and to cooperate with other states endeavouring to do so.
- Ensure, both in law and in practice, that the human rights of those suspected or convicted of crimes under its control are respected, including by ensuring prompt access to legal counsel, frequent judicial review of detention orders, trials conforming to international standards and humane conditions of detention or imprisonment.

To the governments of other states

- Provide any court established by the UN to resolve crimes committed in Timor-Leste in 1999 and in previous years with all necessary support, including funding, technical assistance and expert personnel.
- Enter into effective extradition and mutual legal assistance agreements with Timor-Leste to facilitate prosecutions and trial, in accordance with international fair trial standards, of all suspected perpetrators of crimes against humanity and other serious crimes under international law.
- Adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with universal jurisdiction persons responsible for, or accused of war crimes, crimes against humanity, genocide and other crimes under international law.
- Support judicial reform in Indonesia and efforts to strengthen the justice system in Timor-Leste.

This report summarizes a 71-page document: Indonesia, *Justice for Timor-Leste: The Way Forward* (AI Index ASA 21/006/2004), issued by Amnesty International & JSMP in April 2004. Anyone wishing further details or to take action on this issue should consult the full document. An extensive range of our materials on this and other subjects is available at http://www.amnesty.org and Amnesty International news releases can be received by email:

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INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM

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GLOSSARY

BMP *(Besi Merah Putih)*	Red and White Iron (militia group)
Brimob *(Brigade Mobil)*	Police Mobile Brigade
CAVR (Comissão *de Acolhimento, Verdade e Reconciliacão de Timor Leste)*	Commission for Reception, Truth and Reconciliation
CNRT (*Conselho Nacional da Resistência Timorense)*	National Council of Timorese Resistance
DLU	Defence Lawyers Unit
DPR (D*ewan Perwakilan Rakyat)*	People's Representative Assembly
Fretilin (*Frente Revolucionária de Timor Leste*)	Revolutionary Front for an Independent East Timor
GAM (*Gerakan Aceh Merdeka)*	Free Aceh Movement
Hansip *(Pertahanan Sipil)*	Civil Defence
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICIET	International Commission of Inquiry on East Timor
ICTY	International Criminal Tribunal for the Former Yugoslavia
Interfet	International Force for East Timor
Komnas HAM (*Komisi Nasional Hak Asasi Manusia)*	National Commission on Human Rights
Kopassus *(Komando Pasukun Khusus)*	Special Forces Command
KPP HAM (*Komisi Penyelidik Pelanggaran HAM di Timor Timur)*	Commission of Inquiry on Human Rights Violations in East Timor
KUHAP (*Kitab Undang-Undang Acara Perdata)*	Code of Criminal Procedure
MoU	Memorandum of Understanding
NAD	Nanggroe Aceh Darussalam
NGO	Non-Governmental Organization
P3TT (*Satgas Pelaksanaan Penentuan pendapat di Timor Timur)*	Task Force for the Popular Consultation for East Timor
PKI *(Partai Komunis Indonesia)*	Communist Party of Indonesia
PNTL *(Policia Nacional de Timor-Leste)*	National Police Service of Timor-Leste
Polri *(Kepolisian Republik Indonesia)*	Police of the Republic of Indonesia
PPI *(Pasukan Pejuang Integrasi)*	Integration Fighters Force
SCU	Serious Crimes Unit
TNI *(Tentara Nasional Indonesia)*	Indonesian National Army
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN CHR	United Nations Commission on Human Rights
UNAMET	United Nations Mission in East Timor
UNMISET	United Nations Mission of Support in East Timor
UNTAET	United Nations Transitional Administration in East Timor

Indonesia & Timor-Leste
Justice for Timor-Leste: The Way Forward

1. Introduction

Following the extreme violence that took place during the period surrounding the vote for independence of August 1999 in the Democratic Republic of Timor-Leste (Timor-Leste, formerly known as East Timor),[1] two separate processes for investigating, prosecuting and judging the crimes committed during this period were set in motion, one in Indonesia and one in Timor-Leste itself. In both countries, legislation was put in place specifically to create institutions and a legal framework in which these processes could take place.

After a slow start in Timor-Leste there has been a steady build-up of momentum in the work of the Serious Crimes Unit (SCU) and the Special Panels set up by the United Nations (UN) to investigate and try those indicted for crimes committed in 1999. Its chances of completing its task, however, are extremely remote: its work is hampered by limited capacity and the lack of cooperation of the Indonesian authorities and by the uncertain commitment of the Timor-Leste government and the UN to continuing the process.

The parallel process in Indonesia, where for the first time specially-constituted Human Rights Courts heard the cases of persons accused of responsibility for some of the most egregious cases of violence, has all but come to an end: the trials of the 18 accused have been completed and only appeals in some cases, including of the six people found guilty, remain to be heard.

Even before the trials in Indonesia began there had been doubts about the capacity of a process that was so heavily circumscribed in its scope to deliver truth and justice. The inadequacies of the trials that have since taken place have only confirmed these doubts.

Nevertheless, the processes are significant for two key reasons. First, the trials in Indonesia, however imperfect, represent a first attempt by the Indonesian authorities in what is intended to be an ongoing process of bringing to trial persons charged with crimes against humanity in a range of different cases. Second, the shortcomings of the process in Indonesia to bring to account those regarded as bearing final responsibility for crimes committed in Timor-Leste during 1999, together with the uncertainties surrounding the future of the process in Timor-Leste, throw the spotlight back on the international community and its responsibilities in such situations.

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[1] For the sake of consistency the new name "Timor-Leste" will be used throughout this report except in cases where East Timor is used as part of a formal title or in a quotation.

This is not simply a matter of a general responsibility to uphold international law. The international community formally accepted a specific responsibility in the immediate aftermath of the violence that followed the August 1999 referendum. In Resolution 1272 of 25 October 1999, the UN Security Council condemned all acts of violence in the Indonesian claimed province of Timor-Leste, demanded that those responsible be brought to justice and called for all parties to cooperate with investigations into reports of systematic, widespread and flagrant violations of international humanitarian law and human rights law.[2]

This joint report on the two judicial processes compiled by Amnesty International and the Judicial System Monitoring Programme (JSMP) is intended to contribute towards efforts by the UN Security Council to ensure that its resolutions are implemented. The report provides recommendations for possible ways forward from the two organizations which have closely monitored the progress of the two parallel justice processes since their inception.

It is hoped that this report will also contribute to reforming law and procedures under which gross violations of human rights are investigated and brought to trial in Indonesia. Investigations under the same legislation into several other cases are now underway and one case has proceeded to trial. Already some of the same concerns that arose in the Timor-Leste trials are emerging in these cases. Amnesty International and JSMP believe it to be imperative that the lessons learned from the Timor-Leste trials are acted upon to prevent current and future trials in Indonesia's Human Rights Courts from being similarly discredited.

It is Amnesty International and JSMP's intention that this report will form the basis for constructive discussions on these issues. To this end, the two organizations welcome comments sent by UN Mission of Support in East Timor (UNMISET) on an advance copy of the report. These comments have been reflected in the text where possible. An advance copy was also sent to the Indonesian government, but no comments were received.

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[2] The preamble to Security Council Resolution 1264, approving the dispatch of the Australian-led, International Force for East Timor (Interfet), had already expressed concern at "*reports indicating that systematic, widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor*" and stressed individual responsibility for these acts. (UN Doc. S/RES/1264 (1999).

2. The UN commitment to uphold justice

2.1 Background

In light of continued international pressure, economic crisis and the fall of the Suharto government,[3] Indonesia agreed in 1999 to a UN organized "popular consultation" to determine whether, the Province of East Timor would become an independent nation or remain an autonomous region within Indonesia.[4]

While the UN was to organize the ballot and monitor the implementation of the agreements signed on 5 May 1999 between Indonesia and the former colonial power, Portugal (referred to as the 5 May Agreements), Indonesia was to retain responsibility for maintaining peace and security in the territory so as to ensure that the popular consultation was carried out "*in a fair and peaceful way in an atmosphere free of intimidation, violence or interference from any side*".[5] The 5 May Agreements also provided for the neutrality of government officials and required that campaigning be conducted "*without use of public funds or recourse to pressure of office*".[6] There was also provision for an orderly transfer of authority if the population voted for independence.[7]

Despite these conditions, in the period leading up to the popular consultation the Indonesian army (*Tentara Nasional Indonesia*, TNI), with the support of the civilian authorities, established and trained pro-Indonesian militias to intimidate the population into rejecting independence. Nevertheless, on 30 August 1999, almost 80 per cent of the East Timorese people implicitly voted for independence.

The announcement of this result on 4 September 1999 immediately precipitated a descent into massive violence and destruction throughout the territory. It is now estimated that some 1,400 people were killed in the months preceding and in the immediate aftermath of the ballot. More than a quarter of a million people, or some 30 per cent of the population, were forcibly deported or fled across the border to West Timor in Indonesia, where an estimated 28,000 remain today. An unknown number of people were subjected to other human rights violations, including torture and rape.

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[3] Former President Suharto came to power in 1965 following a coup attempt blamed on the Communist Party of Indonesia (*Partai Komunis Indonesia*, PKI). He remained in power until 1998 when economic crisis and mounting protests against the regime forced him to resign.

[4] Timor-Leste was a Portuguese colony until 1975. In November 1975, following a brief civil war, the Revolutionary Front for an Independent East Timor (*Frente Revolucionária do Timor Leste Independente*, Fretilin) declared the territory's independence. The following month, on the pretext of ending the civil war, Indonesian forces invaded the territory and occupied it. Indonesia declared Timor-Leste its 27th province in July 1976, but it sovereignty was never recognized by the UN.

[5] Between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor (5 May Agreements), Annex 1, Article 3.

[6] 5 May Agreements, Annex 2: Agreement Regarding the Modalities for the Popular Consultation of the East Timorese through a Direct Ballot, Section E (c).

[7] 5 May Agreements, Annex 1, Article 6.

At the time, the extent and uniform pattern of the violence strongly suggested premeditation and overall direction. There is now considerable evidence that the crimes committed before and after the ballot were not spontaneous, but part of a coordinated effort by members of the TNI, Indonesian police (*Kepolisian Republik Indonesia*, Polri) and civilian authorities both in East Timor Province and in the Indonesian capital of Jakarta to influence the outcome of the ballot and to disrupt the implementation of the result. All these authorities are believed to have been involved in the creation of militia groups, and to have provided them with support, in the form of funds, weapons, bases and training. While the militia often acted as a proxy for the Indonesian security forces in carrying out acts of intimidation, harassment and violence against independence supporters, it is also well attested that members of the TNI and Polri were direct participants in much of the violence.

2.2 The UN response to the violence

It is widely agreed that the crimes committed in Timor-Leste were in violation of international humanitarian and human rights law and constituted crimes against humanity. A UN Security Council mission that was dispatched to Jakarta and Dili, the capital of Timor-Leste, from 8 to 12 September 1999 specifically reported that: "*The involvement of large elements of the Indonesian military and police in East Timor in organizing and backing the unacceptably violent actions of the militias has become clear to any objective observer and was acknowledged publicly by the [Indonesian] Minister of Defence on 11 September*". Its report also noted that: "*there was strong prima facie evidence of abuses of international humanitarian law committed since the announcement of the ballot result on 4 September*".[8]

Following visits to both Timor-Leste and Indonesia in late 1999, an investigation team established by the UN, the International Commission of Inquiry on East Timor (ICIET), concluded that there "*there were patterns of gross violations of human rights and breaches of humanitarian law which varied over time and took the form of systematic and widespread intimidation, humiliation and terror, destruction of property, violence against women and displacement of people*".[9]

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[8] Report of the Security Council Mission to Jakarta and Dili, 8 to 12 September 1999. UN Doc. S/1999/976, para. 21.

[9] Report of the International Commission of Inquiry on East Timor to the Secretary-General, January 2000. UN Doc. A/54/726 and S/2000/59, 31 January 2000.

Three UN Special Rapporteurs who visited Timor-Leste in October 1999, also concluded that violations of international humanitarian and human rights law, including murder, torture, sexual violence, forcible transfer of population and other persecution and inhumane acts had been committed on a scale that was "*widespread or systematic or both*".[10]

The UN Security Council recognized its responsibility to ensure that justice for these crimes was delivered, including in Resolution 1264 of 15 September 1999 in which it condemned all acts of violence in Timor-Leste and demanded "*that those responsible for such act be brought to justice.*" In Resolution 1272 of 22 October 1999, the UN Security Council again expressed concern about reports of violations of international humanitarian and human rights law and stressed "*that persons committing such violations bear individual responsibility*". It also called upon all parties to cooperate with investigations into the reports.

The obligation of the international community to ensure justice in Timor-Leste was also recognized elsewhere in the UN system. A special session of the UN Commission on Human Rights (UN CHR) was convened in September 1999 and adopted a resolution affirming that the international community would exert every effort to ensure those responsible for the violence were brought to justice.[11] It was on the recommendation of this special session of the UN CHR that ICIET was established by the UN Secretary-General.

When delivering ICIET's report to the UN Security Council and General Assembly on 31 January 2000, the UN Secretary-General endorsed the view of the ICIET that the nature of the violence and the specific circumstances in which it took place reinforced the need to hold the perpetrators responsible for their actions. He noted that those actions had been directed against a decision of the UN Security Council and were contrary to the agreements reached by Indonesia with the UN to carry out the decision of the Security Council.[12]

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[10] Report on the joint mission to East Timor undertaken by the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the question of torture and the Special Rapporteur on violence against women, its causes and consequences. Situation of human rights in East Timor. UN Doc. A/54/660, 10 December 1999, para. 71.

[11] The UN CHR in its special session of 23-24 September 1999 affirmed "*that all persons who commit or authorize violations of human rights or international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to ensure that those responsible are brought to justice, while affirming that primary responsibility for bringing perpetrators to justice rests with national judicial systems.*" Resolution adopted by the Special Session on East Timor. UN Doc. E/CN.4/S-4/L.1/Rev.1, para 4.

[12] See Identical Letters Dated 31 January 2000 from the Secretary-General addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights, UN Doc. A/54/726, S/2000/59.

2.3 An international criminal tribunal?

Doubts about the capacity or willingness of Indonesia to bring the perpetrators to justice led both ICIET and the three UN Special Rapporteurs to recommend the establishment of an international tribunal to bring to justice perpetrators.[13]

However, in the meantime, assurances were given to the UN Security Council by the Indonesian Foreign Minister that Indonesia would prosecute those within its jurisdiction through the national system.[14] These assurances succeeded in pre-empting moves to resolve the issue through international mechanisms and it was decided instead to give Indonesia the opportunity to hold perpetrators to account through the Indonesian judicial process and through strengthening the capacity of the UN Transitional Administration in East Timor (UNTAET) to conduct investigations.[15]

Thus, while the establishment of an international tribunal was not foreclosed, it was removed from the agenda pending the outcome of the Indonesian process. The UN Secretary-General personally conveyed this message to the Indonesian government during a visit to Jakarta in February 2000. At the time the Indonesian government appeared to accept that failure to deliver justice through the national system would result in the establishment of an international tribunal.

3. Prosecutions in Timor-Leste

While the process in Indonesia was beginning, a parallel process to investigate and prosecute crimes committed during 1999 was being set up in Timor-Leste. Special Panels within Dili District Court were set up by UNTAET, with exclusive jurisdiction over genocide, crimes against humanity, war crimes wherever and whenever they occurred; and over murder, sexual offences and torture that occurred in Timor-Leste between 1 January and 25 October 1999.[16] The Serious Crimes Unit (SCU) was also set up to conduct investigations and prosecutions of these crimes.[17]

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[13] ICIET recommended that the UN should establish "*an international human rights tribunal consisting of judges appointed by the United Nations, preferably with the participation of members from East Timor and Indonesia*". It recommended that the tribunal should sit in Indonesia, Timor-Leste or any other relevant territory (para. 153). The three Special Rapporteurs recommended that: "*Unless, in a matter of months, the steps taken by the Government of Indonesia to investigate TNI involvement in the past year's atrocities bear fruit, both in the way of credible clarification of the facts and the bringing to justice of perpetrators – both directly and by virtue of command responsibility – the Security Council should consider the establishment of an international criminal tribunal for the purpose*" (para. 74.6).

[14] Letter dated 26 January 2000 from the Minister of Foreign Affairs of Indonesia to the Secretary General. UN Doc. A/54/727-S/2000/65, Annex, 31 January 2000.

[15] UNTAET was established under UN Security Council Resolution 1272 of 25 October 1999. It was the executive and legislative authority in Timor-Leste from 25 October 1999 until Timor-Leste became independent on 20 May 2002.

Since Timor-Leste gained its independence on 20 May 2002, the SCU has worked under the legal authority of the Prosecutor General of Timor-Leste. Under UNTAET's successor mission, the UN Mission of Support in East Timor (UNMISET), is mandated to assist the authorities in Timor-Leste in the conduct of serious crimes investigations and proceedings. In reality, the lack of resources, capacity and expertise in Timor-Leste means that the work of the SCU and Special Panels remains heavily dependent on UN staff and UN and other international funding.

3.1 Progress in investigating and prosecuting serious crimes in Timor-Leste

When Indonesia withdrew from Timor-Leste during September and October 1999 it left behind a virtual vacuum. Infrastructure, including courthouses, had for the most part been burnt or otherwise destroyed. The court administration had collapsed and there were few Timorese with any professional experience to take on the roles of judges, prosecutors, defence counsel, court administrators and other positions necessary to the functioning of a judicial system.

Although the process of investigating and bringing to trial suspects in serious crimes cases in Timor-Leste got off to a slow start and was initially much criticized for its poor performance,[18] efforts to resolve management, personnel and resource problems have yielded positive results. Recently, considerable progress has been made both with respect to the drawing up and issuing of indictments and in the conduct of the trials themselves.

Nevertheless, some weaknesses remain which may have an adverse impact on the fairness of trials. Moreover, the ability of the Special Panels to establish full accountability for 1999 events is undermined both by Indonesia's refusal to cooperate with the process and by uncertainties surrounding the future of the SCU and the Special Panels.

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[16] UNTAET Regulation 2000/15 on the Establishment of Panels with Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, 6 June 2000 (Henceforth, UNTAET Regulation 2000/15). The substantive law used by the Special Panels in trials of genocide, war crimes and crimes against humanity is taken almost verbatim from the Rome Statute of the International Criminal Court (ICC). See sections 4, 5 and 6. Crimes of murder and sexual offences are still tried under the provisions of the Indonesian Legal Code. See sections 8 and 9, respectively. Section seven adopts the definition of the crime of torture contained in the UN Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment.

[17] There is some uncertainty about the obligation of the SCU to investigate and prosecute crimes allegedly committed between 1974 and 1999. For a discussion of this issue see JSMP report *Future of the Serious Crimes Unit*, February 2004.

[18] See for example: JSMP report: *Justice in Practice: Human Rights in Court Administration*, November 2001; and Amnesty International Report: *East Timor: Justice past, present and future*, July 2001 (AI Index: ASA 57/0012/2001).

Additional problems are faced by the Special Panels because other states have so far not entered into effective mutual legal assistance and extradition agreements with Timor-Leste that would permit their criminal justice system to assist the Special Panels by such means as seizing funds of suspects and extraditing accused persons to Timor-Leste.

3.2 The cases investigated by the SCU in Timor-Leste

The SCU initially identified 10 priority cases relating to specific incidents, most of which involve mass killings, although there are also cases of sexual violence.[19] The final indictment, (that in the Maliana case) relating to the 10 priority cases was issued in July 2003. The Maliana indictment charges a total of 57 individuals with crimes against humanity, including murder, attempted murder, torture and persecution.[20] In addition five other cases that showed a widespread pattern of serious crimes were also prioritized.

The SCU has also investigated a range of other cases often necessitated by the fact that a potential suspect had returned from West Timor, or had already been detained. It has also focused a part of its efforts on investigating individuals suspected of organizing, ordering, instigating, or otherwise aiding in the planning, preparation and execution of the crimes.

3.3 The Timor-Leste indictments

As of December 2003, the SCU had filed 81 indictments against a total of 369 individuals. Fifty-five of the indictments contain charges of crimes against humanity against 339 accused persons.

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[19] The 10 cases are: the Liquiça church massacre on 6 April 1999; the Los Palos case, 21 April – 25 September 1999; the Lolotoe case, 2 May – 16 September 1999; the murders at the house of Manuel Carrascalão on 17 April 1999; the Kailako and Maliana Police Station killings, April/September 1999; the Suai church massacre on 6 September 1999; the attacks on Bishop Belo's compound and the Dili Diocese on 6 September 1999; the Passabe and Makaleb massacres, September-October 1999; The TNI Battalion 745 case, April-September 1999; and cases of sexual violence from various districts, March-September 1999.

[20] The Maliana indictment relates to an attack by the TNI and militia on individuals seeking refuge in Maliana Police Station which resulted in the killing of more than 13 civilians on 8 September 1999. Thirteen others who escaped the attack were killed the following day.

Several of the more recent indictments are particularly significant because they name as suspects a number of high-ranking Indonesian officials, including military commanders, as well as militia leaders, only some of whom were put on trial in Indonesia.

Importantly, the later indictments also address the institutional responsibility of the Indonesian security forces for the violence. A number of military commanders are specifically charged with participating in the establishment of militia by cooperating on a policy of funding, arming, training and directing the militia. They are accused of having had effective control over militias operating in Timor-Leste and responsibility for crimes they committed. They are also accused of responsibility for the acts or omissions of their subordinates in the Indonesian military due to their failure to take reasonable measures to prevent crimes or punish the perpetrators.

Thus, among those named in an indictment issued in February 2003 are two of the most senior Indonesian military officials at the time: the then Indonesian Defence Minister and Commander of the Armed Forces, General Wiranto;[21] and Major General Zacky Anwar Makarim who was a member of the Task Force for the Popular Consultation in East Timor.[22] Both men were publicly named as suspects in the inquiry initiated in 1999 by Indonesia's National Commission on Human Rights (*Komisi Nasional Hak Asasi Manusia*, Komnas HAM), but were never charged in Indonesia [See Section 8]. In Timor-Leste they are among the senior Indonesian military, police and civilian officials who have been charged with individual criminal responsibility and/or with responsibility for their subordinates in committing crimes against humanity.[23]

Other persons who have been indicted include 15 of the 18 individuals who were brought to trial in the *ad hoc* Human Rights Court in Indonesia. Among the 15 are four individuals who were found guilty of committing crimes against humanity and sentenced to terms of imprisonment. They include two senior military officers: the former chief of the Regional Military Command IX/Udayana (which covered East Timor Province), Major General Adam Damiri; and Brigadier General Mohammad Noer Muis, the former Military Commander for Timor-Leste for the period from 13 August 1999. They were sentenced to three and five years' imprisonment respectively for crimes against humanity, although in neither case has the sentence been imposed [See Section 9.9].

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[21] General (retired) Wiranto is currently a potential candidate for the Golkar Party in the Indonesian Presidential elections which are scheduled to take place in July 2004.

[22] The mission of the task force or *Satgas Pelaksanaan Penentuan Pendapat di Timor Timur* (P3TT) was to coordinate with the UN Mission in East Timor (UNAMET) which was responsible for implementing the ballot.

[23] See Deputy General Prosecutor for Serious Crimes against Wiranto, Zacky Anwar Makarim, Kiki Syahnakri, Adam Rachmat Damiri, Suhartono Suratman, Mohammad Noer Muis, Yayat Sudrajat and Abilio Jose Osorio Soares, 22 February 2003.

Eleven of those acquitted of committing crimes against humanity by the *ad hoc* Human Rights Court in Indonesia have been indicted by Timor-Leste's General Prosecutor. They include the former Chief of Police and the former Military Commander for Timor Leste, Brigadier General Timbul Silaen and Brigadier General Suhartono Suratman respectively.[24]

The range of crimes with which suspects have been charged in Timor-Leste goes far beyond the charges of murder and persecution as crimes against humanity contained in the Indonesian indictments. Around 90 per cent of the suspects indicted by Timor-Leste's prosecution service are charged with crimes against humanity, including murder, sexual offences, torture, inhuman acts, persecution, deportation and unlawful imprisonment. Individual cases of murder, rape, torture and other serious crimes committed in the territory between 1 January and 25 October 1999 have also been investigated and in some cases prosecuted.

3.4 Resources, management and administration of the Special Panels

For the first two years of operation, trials by the Special Panels were subject to lengthy delays resulting from lack of capacity, poor administration and lack of organizational planning in the allocation of cases. During 2003 many of these difficulties were resolved.

The initial delays arose in large part because, although the UN budget provided for two Special Panels and the first began operating in January 2001, the second was not operational until November 2001 because international judges had not been recruited. Even then the shortage of international judges – each Panel is comprised of one local and two international judges - meant that during 2002 the two Special Panels could not sit simultaneously. The difficulties resulted both the unsuitability of existing UN recruitment procedures for recruiting judges, as well as the effect that the Timor-Leste government's insistence that judges should be from civil law states and speak Portuguese has had on limiting the pool of potential candidates. These criteria have been imposed despite the fact that the Special Panels use mixed jurisdiction procedures and Portuguese is not widely spoken by defendants, witnesses or victims.

Since mid-2003 the full complement of four internationally appointed judges has been in place and both Panels have been able to sit at the same time with the result that trials are now proceeding in a more timely fashion and inroads have been made into the backlog of cases that had been built up.[25]

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[24] Brigadier General Suhartono Suratman preceded Brigadier General Mohammad Noer Muis as Military Commander for Timor-Leste.

While the impact of poor personnel management was more acute during the early stages, these administrative problems have not been entirely resolved and continue, on occasions, to impact negatively on the smooth running of the trials and the right of suspects to trial without undue delay. Difficulties in recruiting international judges and the short-term contracts on which they work are among the primary causes of these delays.

For example, in April 2003, Judge Benfeito Mosso Ramos, an international judge from Cape Verde finished his employment while cases he was hearing were still in progress. A number of trials had to be restarted as a result. Among the cases was that of Lino de Carvalho, a militia leader from the Sub-district of Batugade in Bobonaro District. Lino de Carvalho was detained in late October 2000 and charged in May 2001 with committing crimes against humanity, including murder and inhumane acts. His trial began in February 2002. Over one year after the trial had begun Judge Benfeito Mosso Ramos left the country causing the process to be stopped. The trial was recommenced in February 2004 under a newly constituted Special Panel.[26] Lino de Carvelho has since been found guilty of murder as a crime against humanity and sentenced to seven years' imprisonment.

Other concerns have been raised about the experience of some of the international judges on the Special Panels. According to the regulation on the establishment of the Special Panels, "*due account of the experience of the judges in criminal law, international law, including international humanitarian and human rights law*," should be considered in the overall composition of the panels.[27] However, it appears to have been difficult to attract international judges with relevant legal background and experience to Timor-Leste to sit on the Special Panels and in some case judges have been employed who have only limited expertise or experience in the relevant fields of law.

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[25] At the time of writing, 13 trials with a total of 31 defendants were proceeding or were scheduled to commence.

[26] A similar situation was narrowly avoided in October 2003 when Judge Dora Martins de Morais, an international judge from Brazil was requested by the Brazilian authorities to terminate her contract early and recommence her work as a judge in Brazil. Her return would have resulted in one of the two Special Panels having to stop their work until a replacement was appointed. In the event, an arrangement was worked out between the Timor-Leste Government, UNMISET and the Brazilian authorities which resulted in the judge being able to remain for a further two months. See JSMP Press Release "Special Panels for Serious Crimes Face Further Setback as International Judge Called Home", 20 October 2003.

[27] UNTAET Regulation No. 2000/15, Section 23.2.

3.5 Periods of pre-trial detention for suspects in serious crimes cases in Timor-Leste

All suspects have a right to "prompt" judicial review of their detention,[28] and the right to a trial without undue delay.[29] The Human Rights Committee has stated that "*Pre-trial detention should be an exception and as short as possible*".[30] This right applies equally to those accused of crimes against humanity.[31]

In the first few years of the Special Panels' operation, it was not uncommon for suspects to spend many months and, in some cases, years in detention awaiting trial. Lino de Carvalho, for example, spent two years in detention before he was conditionally released on 28 October 2002. However, the establishment of the second Special Panel and the speed with which both Panels are now working has gone a long way to resolving such problems.

Nevertheless, a few suspects still experience long periods in detention prior to their trial commencing or verdicts being reached. For example, Paulino de Jesus, a former soldier in the TNI, spent one year and eight months in detention before he was acquitted on 8 December 2003. He had been arrested on 10 May 2002 and charged with murder and attempted murder in Bobonaro District in September 1999.[32]

Under the Transitional Rules of Criminal Procedure, detainees should not be held beyond the legal limit of six months except when there are "exceptional grounds" and in "particularly complex" cases, when suspects may be detained for an unspecified period of time.[33] Amnesty International has previously raised concern that this provision provides scope for unlimited detention without any definition of permissible reasons for extending the detention and is, therefore, inconsistent with the right to trial within a reasonable time or release.

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[28] Article 9(3) ICCPR.

[29] Article 14(3)(c) of the ICCPR.

[30] Right to liberty and security of persons (Art. 9): ICCPR General comment 8, 30 June 1982.

[31] See the Statute of the International Criminal Tribunal for the former Yugoslavia, Article 21(4)(c); the Statute of the International Criminal Tribunal for Rwanda, Article 20(4)(c); the Rome Statute of the ICC, Article. 67(1)(c).

[32] Paulino de Jesus was the first person to be acquitted by the Special Panels in Timor-Leste since trials began in January 2001.

[33] UNTAET Regulation 2001/25 on the Amendment of UNTAET Regulation 2000/11 on the Organization of Courts in East Timor and UNTAET Regulation No. 2000/30 on the Transitional Rules of Criminal Procedure, UN Doc. UNTAET/REG/2001/25, 14 September 2001, Section 20.12, (hereafter the Transitional Rules of Criminal Procedure). Under the Transitional Rules of Criminal Procedure, it is normally the case that a suspect may be kept in pre-trial detention for a maximum of six months from the date of arrest (Section 20.10). This period can be extended by three months in cases where there are "*compelling grounds*" and where a crime carries a term of imprisonment of more than five years (Section 20.11).

In apparent recognition of this risk, the Court of Appeal issued a potentially significant ruling in September 2003 in the case of a suspect who had been in pre-trial detention for 17 months. The ruling stated that the suspect, Carlos Ena, who had been arrested in May 2002, should be released on the ground that there were no exceptional circumstances to justify his continued detention. Carlos Ena is charged with murder, attempted murder and inhumane acts as crimes against humanity allegedly committed in Oecussi District during 1999. His trial began on 15 September 2003.

Although the ruling in Carlos Ena's case from the Court of Appeal is encouraging, it is not clear that it has influenced decisions concerning the pre-trial detention in the cases of other suspects in serious crimes cases.

3.6 Judicial review of detention in Timor-Leste

Some concerns about inadequate judicial review of detentions also remain. The illegal detention of suspects after their detention orders have expired has been commonplace since the Timor-Leste judicial system was established in 2000. Although attention has been repeatedly drawn to the problem and there have been intermittent attempts to resolve it, first by UNTAET and more recently by the Timor-Leste authorities, little progress has been made.

Under the Transitional Rules of Criminal Procedure, detention of suspects should be reviewed by a judge every 30 days.[34] Yet, at any given time over the last year, it was usual for between one third and one half of all detainees held in one of Timor-Leste's three prisons to be held on expired detention orders. The majority of these detainees are persons accused of ordinary crimes, although there have also been occasions when serious crimes suspects have been held beyond the expiry of their detention orders.

It is possible that the situation may worsen following a Court of Appeal ruling in September 2003 on an interlocutory appeal in a serious crimes case which appears to directly contradict the 30-day review rule provided for by the Transitional Rules of Criminal Procedure.[35] In the case of Beny Ludji, an alleged militia leader who is accused of murder as a crime against humanity, the defence lodged an appeal in July 2003 on several grounds, including that the accused had been held in pre-trial detention on an expired warrant for two weeks. The original warrant had been issued by a local Investigating Judge.

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[34] The Transitional Rules of Criminal Procedure, Section 20.9.

[35] The international judges on the Court of Appeal are UN appointees. Their appointments are approved by the Timor-Leste government and they come under the authority of the Timorese Superior Council of the Magistracy.

Two months later, in September 2003, the Court of Appeal issued a ruling in which it stated that "*...a judge only has the obligation to review the initial detention period every 30 days if there are new facts or evidence that supports an act of changing limits or freedom of the suspect/accused*". The Court further ruled that a 30-day detention warrant may be valid for six months from the date of arrest, which would appear to mean that the 30-day reviews of detention are not a requirement. On the basis that Beny Ludji had at the time been detained for less than six months, the Court of Appeal rejected the application for his release, which had claimed that his continued detention was illegal.[36]

Amnesty International and JSMP are concerned that this ruling is in contravention of both the Transitional Rules of Criminal Procedure[37] and the UN Body of Principles on the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles) which requires the authorities to keep the necessity of detention under review.[38]

There is an additional concern in this case relating to the alleged ill-treatment of Beny Ludji by the police. The assaults, one of which is reported to have left him unconscious, allegedly took place in April 2003 while Beny Ludji was in police custody in Maliana town, Bobonaro District. Four members of the National Police Service of Timor-Leste (*Policia Nacional de Timor-Leste*, PNTL) have since been charged with "light maltreatment" which carries a punishment of three months' imprisonment.[39]

There are a growing number of reports of ill-treatment of detainees in both police custody and prison in Timor-Leste. The risk of such practices occurring is exacerbated by inadequate judicial review of detentions, which mean a loss of opportunities for judges to ensure that detainees are treated properly. It is also possible that the frequency of such incidents will increase further as PNTL officers, who lack training, experience and oversight, take over responsibilities from the UN Police.[40]

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[36] Case No. 40/03: Beny Ludji v General Prosecutor, 12 September 2003.

[37] Section 20.9 of the Transitional Rules of Criminal Procedure provides that: *"The Investigating Judge shall review the detention of a suspect every thirty days and issue orders for the further detention, substitute restrictive measures or for the release of the suspect."*

[38] Article 39 of the Body of Principles states that: "*Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.*"

[39] Five PNTL officers were originally named as suspects. It is unclear why charges against the fifth have been dropped. All five were originally suspended. However, despite the seriousness of the allegations against them they were later reinstated reportedly because of the heavy workload in the district.

Cases of illegal detention have also arisen where local judicial officials have acted beyond their authority. Again, such cases are more common in relation to ordinary crimes, but have also occurred in serious crimes cases. They point to ongoing weaknesses within the broader criminal justice system and highlight the urgent need for effective review and accountability mechanisms to be established. Additional training and support of judicial officials may also help to avoid such problems.

In one recent case, an individual was detained for seven weeks without substantive reason and against the explicit instructions of the prosecution. Laurindo Vidigal was arrested on 2 September 2003 in relation to a case of rape that took place in 1999. He was interviewed by the prosecution who filed an application on 4 September 2003 for his conditional release. The Investigating Judge, whose role includes the protection of the rights of suspects and who has no authority to detain an individual except at the request of a public prosecutor, ignored the application and remanded Laurindo Vidigal in custody for 30 days. Efforts by Laurindo Vidigal's defence counsel to secure his release from illegal detention met with a series of obstacles. An interlocutory appeal filed with the Court of Appeal on 8 September 2003 was not heard until 36 days later on 14 October 2003, although under the Transitional Rules of Criminal Procedure an interlocutory appeal must be heard within 10 days. In the meantime, the original 30 day detention order had also expired. Laurindo Vidigal remained in custody despite the expired detention order.

When the appeal of detention order was finally heard on 14 October 2003 the Court of Appeal was informed by the prosecution that the case file had been closed and that no further action would be taken in the case. The Court of Appeal ruled that since the case was closed the decision to release Laurindo Vidigal rested with the Investigating Judge. The following day an urgent application for his release was filed by the prosecutor stating that the case was closed pending further information and that no further action would be taken. Eventually, because both the Investigating Judge and Court of Appeal refused to issue an order to release Laurindo Vidigal, a writ of *habeas corpus* was filed with the Special Panel which ordered his release on 21 October 2003.

Laurindo Vidigal's case is not unique. There have other instances in both serious and ordinary crimes cases where Investigating Judges have ignored applications by prosecutors for release or conditional release and where remedy has proved difficult to achieve.[41]

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[40] As of December 2003 operational responsibility for policing Timor-Leste's 13 districts has been with the PNTL, although executive responsibility rests with UN Police until May 2004.

3.7 The quality of the defence for suspects in serious crimes cases in Timor-Leste

The entitlement to a lawyer "*of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance*", is contained in Principle 6 of the UN Basic Principles on the Role of Lawyers. This principle is further elaborated in the concept of "equality of arms",[42] which means that both parties are treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case. In criminal hearings, where the prosecution has an inherent advantage because it has the machinery of the state behind it, the principle of equality of arms is an essential guarantee to the right to fair trial.

Equality between the prosecution and defence in Timor-Leste has yet to be fully achieved. Initially, legal representation for all individuals accused of serious crimes was provided by the small pool of Timorese public defenders who, it was widely acknowledged, had neither the experience nor the capacity to effectively defend such cases.[43] This role has since been taken over by a team of international lawyers who form the Defence Lawyers Unit (DLU) to the Special Panels. While resulting in a significant improvement in the quality of the defence, some concerns about equality of arms remain. In particular, concerns have been raised that not all of those recruited to the DLU have sufficient criminal trial experience or practical experience in defending cases involving breaches of international humanitarian or human rights law. JSMP, which regularly observes trials before the Special Panels, has noted occasions where preparation of cases was inadequate and advocacy skills were below the standard expected of defence counsel in such cases. The ability of the defence lawyers to work effectively is also hampered by limited resources. The DLU is stretched by the busy trial schedule which has on occasions required assistant lawyers to represent suspects in court. Moreover the limited number of support staff means that lawyers have difficulty in going to the field to seek out witnesses or other information required to building a defence.

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[41] For example, the case of Carlito Soares Pereira, Jose Godinho Barros and Antonio Jose Armando in which the prosecutor for serious crimes filed an application for conditional release on 1 December 2003. The three had been arrested on 12 October 2003 and held in custody at the request of the prosecutor on an order that expired on 14 December 2003. The application for conditional release was rejected by the Investigating Judge on 5 December 2003 and the detention of the three detainees was extended until 13 January 2004. The three were granted release by a Special Panel on 10 December 2003, effective on 14 December 2003, after a writ of *habeus corpus* had been filed with it.

[42] See for instance UN CHR Resolution 2002/37, para. 6, where the Commission: *"Calls upon States to ensure the principle of equality of arms within their judicial systems, inter alia, by providing to those being tried the possibility to examine, or to have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them*". UN Doc. E/2002/23- E/CN.4/2002/200, 22 April 2002.

[43] See Amnesty International Report*: East Timor: Justice past, present and future*, July 2001 (AI Index: ASA 57/001/2001).

3.8 The right to a public hearing

The right to a public hearing is provided for in the Universal Declaration on Human Rights (UDHR) and in the International Covenant on Civil and Political Rights (ICCPR).[44] This means that not only the parties to the case, but also the general public, have the right to be present during a trial and the right to know how justice is administered, and what decisions are reached by the courts.

Lack of publicly available information about trial hearings and limited access to documents and judgments from the Special Panels has limited the possibility of public attendance at the trials in Dili in the past. Here too the situation has improved over time. For example, a list of planned hearings is now provided every Friday and is posted outside the court registry. However, official transcripts of court proceedings are still not available and judgments can only be obtained by approaching the court registry or individual counsel.

3.9 Interpretation

Both the right of the public to information during hearings and the right of the accused to interpretation where they do not fully understand or speak the language of the Special Panels has been undermined by inadequate court interpretation.[45] The fact that Special Panels' proceedings are conducted in a minimum of four different languages; Portuguese, English, Bahasa Indonesia and the local language of Tetum (other local languages are also used in some case) has always made interpretation a challenging and resource-intensive, issue. An acute shortage of qualified interpreters and the low quality of some interpretation meant that in the early trials interpretation was wholly inadequate.

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[44] Article 10 of the UDHR states: "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him*". Article 14(1) of the ICCPR provides that: "*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*".

[45] The right of the accused "*to have the free assistance of an interpreter if he cannot understand or speak the language used in court*" is provided for in the ICCPR Article 14(3)(f). The Rome Statute of the ICC similarly provides that the accused shall be entitled "[*t*]*o, have free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks*". (Article 67(1)(f)).

Again, this situation has improved. However, it remains the case that interpretation for some local languages is not always available and members of court registry staff are sometimes called upon to interpret. In a hearing in mid-November 2003, in the case of the Public Prosecutor v Carlos Soares, no Tetum translation was made for the public present in the court gallery. In this hearing closing statements for each of the parties were presented. Apparently to save time, the Special Panel ordered the court interpreter to make a private translation to the accused rather than provide a general translation in the courtroom, thereby excluding the public, among who were family members of the accused who had travelled from out of Dili to attend the hearing.

In the case of the Public Prosecutor v Paulino De Jesus, neither Tetum nor Bahasa Indonesia interpretation was made available in a hearing on 18 November 2003. The hearing was conducted mainly in Portuguese, and could not be understood by either the defendant or his family members who were attending the trial.

In recognition of the problem, UNMISET has proposed to the Security Council that adequate financial resources be made available to recruit qualified interpreters, translators and transcribers, as well as simultaneous interpretation facilities.

3.10 The right to appeal

The right of anyone convicted of a criminal offence to appeal is recognized in the ICCPR.[46] That right is necessarily a right to a prompt appeal.[47] In Timor-Leste, where the Court of Appeal resumed sitting on a regular basis only in July 2003 after a break of 18 months, the right to appeal has in many cases been denied. As with the Special Panels, problems arose primarily as a result of delays in identifying and recruiting international judges.[48]

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[46] Article 14(5) of the ICCPR provides that: "*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*"

[47] Commenting on Article 14(3)(c) (see above, sec. 3.6), the Human Rights Committee stated that: "*To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay', both in first instance and on appeal.*" Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article. 14): ICCPR General Comment 13, 13 April 1984, para. 10.

[48] Responsibility for judicial appointments rests with the Superior Council of the Magistracy which was constituted in February 2003, but did not begin functioning until May 2003.

In the meantime, a considerable backlog of cases built up, such that by October 2003 there was still a backlog of 80 appeals, including eight appeals against final decisions from the Special Panels and 26 interlocutory appeals in cases relating to serious crimes.[49]

Although inroads have been made into this backlog, as of late 2003, five appeals from 2001 remained pending, of which four were from the prosecution and one from the defence. Among them is the Los Palos case, in which 10 members of the Team Alpha militia group were found guilty of committing crimes against humanity and sentenced to between four and 33 years and four months' imprisonment on 11 December 2001, appeals had yet to be heard as of March 2004.[50]

Defence lawyers have also complained that interlocutory appeals are often not heard within the statutory time limit, in contravention of the right to appeal as provided for in international law. In some cases, such delays result in further hardships for detainees. Such was the experience of Laurindo Vidigal, where it took five weeks for the interlocutory appeal on his detention to be heard, during which time he remained in illegal detention.

Observers have also raised concerns that that there is no effective system to ensure the dissemination of decisions by the Court of Appeal; and that decisions, two thirds of which are delivered in Portuguese, are not translated in to English, Bahasa Indonesia or Tetum with the result that some trial judges, defence lawyers and suspects cannot understand them.

3.11 Applicable law

Several unusual decisions by the Court of Appeal have created disquiet among legal experts and observers. Two such decisions have already been referred to in this report. Another, which created considerable confusion, was a ruling in July 2003 that the applicable law, where no UNTAET or Timor-Leste law exists, is Portuguese rather than Indonesian law contrary to general understanding of provisions in UNTAET Regulation 1/1999.[51]

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[49] See JSMP Report: *The Right to Appeal in East Timor*, October 2002.

[50] The Los Palos case is one of the ten priority cases. The charges against the ten men related to five incidents between April and September 1999 in Lautem District, including torture, murder, forced deportation of the civilian population and murder of a group of clergy.

[51] Section 3 of UNTAET Regulation 1/1999 provides that: "*Until replaced by UNTAET regulations or subsequent legislation of democratically established institutions in East Timor, the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict with the standards referred to in Section 2* [core internationally recognized human rights standards]...". It was

The Court further ruled that UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences was unconstitutional because it violated the legal principle of non-retroactivity of criminal laws. The ruling ignored treaty and customary law exceptions relating to non-retroactivity for acts which, at the time, they were committed were criminal according to the general principles of law recognized by the community of nations.[52] Although not binding on the other courts, the decision had potentially serious implications for the continuation of the serious crimes process and called into question the validity of previous convictions.[53]

The ruling was delivered in the case of Armando dos Santos, who was acquitted by the Special Panel of crimes against humanity, but convicted of three counts of murder and sentenced to 20 years' imprisonment. The acquittal of crimes against humanity was appealed by the prosecution. In its decision on the appeal, the Court of Appeal found that the appellant should have been convicted under Portuguese criminal law, which includes genocide. Although Armando dos Santos had not been charged with genocide, and without providing legal argument as to why, the Court of Appeal found him guilty of genocide and increased his sentence to 25 years' imprisonment.[54]

The issue of applicable law has since been partially resolved with the adoption by the National Parliament, on 8 October 2003, of a law stating that applicable law in Timor-Leste is law promulgated by Timor-Leste after its independence (20 May 2002), UNTAET regulations and in the absence of either, Indonesian law. In the meantime, Armando dos Santos has been convicted by the Court of Appeal under a law which is without force in Timor-Leste. The prosecution have appealed the decision, but at the time of writing had not received a response from the Court of Appeal. It also remains to be seen how the Court of Appeal will respond to the issue of applicable law between October 1999 and May 2002.

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generally accepted that the laws that applied in East Timor prior to 25 October 1999 was Indonesian law.

[52] Article 15.2 of the ICCPR states that: "*Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.*"

[53] On 24 July 2003, the Special Panels made a decision that they would continue to apply the UNTAET Regulation under which they were established.

[54] The Timorese judge on the bench dissented from this majority view and found instead that the applicable law was Indonesian.

4. The future of the serious crimes process

Despite the considerable progress, particularly in the last year by the Special Panels, it is not possible for Timor-Leste's fledgling justice system to resolve fully the issue of justice, either for human rights violations and abuses committed in 1999 or the many other crimes that took place previously during the Indonesian occupation, without a major internationally supported effort to rebuild the criminal justice system and full cooperation by other states, including Indonesia.

Lack of capacity, both among the Special Panels and the prosecution means that it is unlikely that hearings in all the cases in which there are already indictments will be completed by 19 May 2004, the date on which UNMISET's mandate is due to expire.

Many other cases will not have been investigated. Of the estimated 1,400 murders that took place during 1999, the SCU expects to have completed investigations into only 40 to 50 per cent by May 2004. Numerous other cases of torture, rape and other crimes of sexual violence, forced deportation, destruction of property and other crimes will also remain outstanding. According to one senior official in the SCU, in order to complete investigations into the 600-700 outstanding murder cases, 30 qualified investigators will be required until May 2005. However, as of January 2004 the investigation component of the serious crimes process had been reduced to eight civilian investigators in the SCU and 10 UN Police investigators.[55]

The future of the serious crimes process in Timor-Leste following the end of UNMISET's mandate is as yet unclear. However, it is certain, that without UN support the process would grind to a halt. Discussions are already well-advanced about the nature of UN support for Timor-Leste after May 2004. The UN Secretary-General has recommended that the Security Council provide assistance to the serious crimes process for another year, but adds that such assistance should be focused on the defence and the judiciary, rather than investigation.[56] The Secretary-General's continued determination that perpetrators of serious crimes in 1999 in Timor-Leste must be brought to justice is to be welcomed. However, if support is only provided for prosecuting those cases that have already been investigated, an arbitrary line will have been drawn which will result in many hundreds, possibly thousands, of victims and their families being denied truth and justice.

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[55] Some training of local police officers is being undertaken to try and compensate for the reduction.

[56] Special report of the Secretary-General on the United Nations Mission of Support in East Timor, 13 February 2004, S/2004/117.

On the side of the Timor-Leste government, there is uncertain commitment to the continuation of the process. At a purely pragmatic level, Timor-Leste, as the newest and amongst the poorest nations in the world, does not have the capacity to shoulder the cost of a justice process on the scale of that required without substantial and long-term assistance from the international community.

Political considerations have also influenced the views of some government officials who have openly expressed concern about the potential damage that indictments against Indonesian officials could do to government efforts to build cordial relations with Indonesia.

The inequity involved in bringing low-level militia members to trial in Timor-Leste, while their commanders and high-level civilian and military officials have at most been subjected to the imperfect processes of the *ad hoc* Human Rights Court in Indonesia, has also persuaded some government officials in Timor-Leste that the attempt to achieve some measure of justice through the Special Panels should be abandoned.

Perceptions of injustice or imperfect justice are reinforced by the disparities between the sentences handed down in Indonesia and those in Timor-Leste. Suspects found guilty by the Special Panels in Timor-Leste, most of who are uneducated, low-level militia, have in a few cases been sentenced to lengthy terms of imprisonment of up to 33 years and four months.[57] In Indonesia, where officials and a militia leader widely regarded as bearing significant responsibility for orchestrating the crimes in Timor-Leste were tried, the longest sentence handed down was 10 years, but prison terms of three and five years were the norm for those found guilty [See Section 8.9].

However, in the wider society in Timor-Leste, as expressed through the hearings of the Commission for Reception, Truth and Reconciliation (*Comissão de Acolhimento, Verdade e Reconciliacão de Timor Leste*, CAVR) and in other fora, there is much evidence that the demand for justice in society, including among victims and their families, remains strong.[58] There is a feeling that not just those few, relatively low-level perpetrators whom the justice system in Timor-Leste has been able to bring to account should face prosecution. Non-governmental organizations (NGOs) in Timor-Leste have consistently taken the lead in advocating an international tribunal.[59] Recognizing this widespread sentiment, some government officials have expressed fears that the failure to secure justice could give rise to internal political problems.[60]

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[57] Ten men in the Los Palos case were found guilty of charges related to five incidents in Lautem District that occurred between April and September 1999, including the ambush and killing of a group of clergy on 25 September 1999. Three of the 10 were sentenced to 33 years and four months' imprisonment. The remaining seven received prison sentences of between four and 23 years.

[58] Recent evidence is presented in a report by the International Centre for Transitional Justice (ICTJ), *Crying Without Tears in Pursuit of Justice and Reconciliation in East Timor: Community Perspectives and Expectations*, August 2003. See also Asia Pacific Centre for Military Law and JSMP, *Report of Proceedings: Symposium on Justice for International Crimes Committed in the Territory of East Timor*, University of Melbourne, Faculty of Law, 16-17 January 2003.

4.1 Lack of cooperation by Indonesia

The limited prospects for the Timor-Leste process being able to deliver full accountability are only partly accounted for by the immaturity and limited resources of Timor-Leste's justice system. Lack of Indonesian cooperation is no less important and, ultimately, it will be decisive in whether or not the Special Panels can complete their work.

As of early December 2003, 281 of the 369 accused persons, just over three quarters of the total, were at large in Indonesia. They include nearly 40 Indonesian Commanders and officers, including the former Commander of the Armed Forces. Other relatively senior officials, including four senior (provincial or district-level) police commanders, five former district administrators and the former Governor, are also now residing in Indonesia and their chances under the current Indonesian government of facing trial in Timor-Leste in the foreseeable future are thus remote.[61]

The Indonesian government has publicly said that it will not cooperate with the Timor-Leste government in bringing to trial persons against whom indictments have been presented to the Special Panels, specifically with regard to the seven military officers and one civilian official charged with senior command responsibility for crimes against humanity in the indictment against General Wiranto and seven others, issued in February 2003.[62] The Indonesian Foreign Minister, Dr. Hassan Wirajuda, said that his government would *"simply ignore"* the indictments, on the grounds that the UN had no mandate to try Indonesian citizens in Timor-Leste.[63]

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[59] The East Timorese Alliance for an International Tribunal, of which JSMP is a member, was established in July 2002. It includes many local and international NGOS. It continues to lobby for an International Tribunal for Timor-Leste.

[60] See, for example, "Timor Prosecutor Makes Case for Trials", The Age (Melbourne), 17 September 2003.

[61] Office of the Deputy General Prosecutor for Serious Crimes, Serious Crimes Unit Update VII/03, 5 August 2003.

[62] Deputy General Prosecutor for Serious Crimes Against Wiranto, Zacky Anwar Makarim, Kiki Syahnakri, Adam Rachmat Damiri, Suhartono Suratman, Mohammad Noer Muis, Yayat Sudrajat and Abilio Jose Osorio Soares.

[63] "Indonesian Politicians React to UN Move to Indict Senior Military", Detik Com, 26 February 2003; and "Indonesia Will Ignore Indictments of Ex-Officials", Associated Press, 25 February 2003.

These comments reflect a longer standing reluctance by Indonesia to cooperate with the serious crimes process in Timor-Leste. Prosecutors from Indonesia's Attorney General's Office travelled to Timor-Leste several times and UNTAET investigators shared information with their Indonesian counterparts in accordance with the terms of the Memorandum of Understanding (MoU) on legal cooperation signed with Indonesia's Attorney General in April 2000. Although the parties had agreed to provide legislative backing to the commitments they had made in the MoU as necessary, vociferous challenges to the validity of the agreement by members of the TNI and nationalist politicians and lawyers in Indonesia limited its long-term usefulness, and the cooperation offered by UNTAET was never reciprocated.

To date Indonesia has also been reluctant to respond to arrest warrants issued by Interpol against suspects indicted by the Prosecutor General in Timor-Leste. As of the beginning of 2004, Interpol Red Notices had been obtained in relation to more than 40 individuals believed to be residing in Indonesia.[64] Indonesia, is a member of Interpol, but has no extradition treaty with or other effective cooperation on mutual legal assistance agreement with Timor-Leste.

5. The limited steps taken by Indonesia to investigate and prosecute

In Indonesia forthright international expressions of concern, accompanied by threatened and actual sanctions, influenced the government to take its own steps to show that it was moving to bring those responsible for the violence to account. On 22 September 1999 the National Human Rights Commission (*Komisi Nasional Hak Asasi Manusia*, Komnas HAM) used its powers under a government regulation expressly issued for the purpose to set up a special team, the National Commission of Inquiry on Human Rights Violations in East Timor (*Komisi Penyelidik Pelanggaran HAM di Timor Timur*, KPP HAM), to investigate human rights abuses in Timor-Leste during the period from 1 January to 25 October 1999.

5.1 The report by the National Commission of Inquiry on Human Rights Violations in East Timor (KPP HAM)

The KPP HAM report, released in January 2000, recommended the prosecution of perpetrators through Indonesian national institutions. The report contained substantial evidence of a widespread as well as systematic campaign of terror involving extensive crimes against humanity. Findings such as these were controversial given the military's well-documented influence in Indonesian politics and point to significant independence on behalf of Komnas HAM.

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[64] Red notices are a means of circulating national arrest warrants or court rulings internationally; they are requests that the person concerned be arrested with a view to extradition.

The report concluded that the violence in Timor-Leste was widespread, organized and systematic and involved the commission of crimes against humanity, including mass murder, torture and assault, enforced disappearances, violence against women and children (including rape and sexual slavery), forced deportation, and the destruction of property. It also found that the violence was orchestrated by the civilian and military apparatus, both on the ground in Timor-Leste and, in the case of the military, at the highest command levels in Indonesia.

The team logged a total of 670 cases of human rights violations occurring between January and December 1999, of which the largest number (73 per cent) occurred in the months of April (41 per cent) and September (32 per cent). The majority of these cases (59 per cent) involved violations of the right to life. The team stressed that because of time and resource limitations and the intentional destruction of evidence, these data did not convey the full extent of the human rights violations that occurred.

On the basis of a variety of evidence, including official documents, communications and testimony the report concluded that there were close links between the civilian administration and the military, on the one hand, and armed civilian groups (the militia) and pro-integration political organizations, on the other, aimed at securing victory for the autonomy option in the referendum.

These links were substantiated by evidence that security personnel were working with militia groups; that the militia groups relied heavily for recruits on the official paramilitary organizations belonging to the Civil Defence (*Pertahanan Sipil*, Hansip)[65] and voluntary civil security organizations, called *Pamswakarsa*; that the TNI conducted joint operations with the militia; that the TNI permitted the militia use their facilities and supplied the latter with arms; and that the militia operated with impunity. On the basis of this evidence, the report concluded that the violence that followed the announcement of the result of the ballot was not the manifestation of civil war, but was systematic violence carried out by the militias and organized by the military and the police.

Thirty-two names of suspects were made public by KPP HAM. The full report contained a longer list of 100 persons, who had allegedly been directly or indirectly involved in the events of 1999. Although he was not included in the list of 32, the report made specific reference to the role of the Commander of the Armed Forces, General Wiranto, concluding on the basis of its investigations that he was aware of the "widespread and organized" violations of human rights that occurred in the period surrounding the referendum and had ultimate responsibility for the breakdown of security in the aftermath of the announcement of the result of the ballot. The report highlighted 14 prominent cases, comprising 13 specific incidents and a set of cases involving violence against women.

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[65] Hansip was divided into two sections - Kamra, which served as a police auxiliary and Wanra which served the army.

5.2 The cases selected for criminal investigation in Indonesia

The Attorney General in February 2000 announced that priority was to be given to the investigation of only five incidents out of the 670 cases documented by KPP HAM. The cases selected by the Attorney General's Office were:

- the killing of civilians in a church in the town of Liquiça on 6 April 1999;
- the attack on the house of Manuel Carrascalão in Dili on 17 April 1999;
- the killing of civilians who had sought refuge in a church in Suai, Covalima District on 6 September 1999;
- the attack on Bishop Belo's residence on 6 September 1999; and
- the killing of a Dutch journalist, Sander Thoenes, on 23 September 1999.

While these cases undoubtedly represented some of the most horrific incidents that occurred during 1999 they are only a small part of a wider pattern of widespread, as well as systematic, violence that took place throughout the year.

The Liquiça attack – As many as 2,000 people were taking refuge from militia attacks in the São Brito Church compound in the town of Liquiça on 6 April 1999. Following a refusal by the parish priest to surrender a pro-independence activist in the church, members of the *Besi Merah Putih* (BMP) militia[66] allegedly supported by the TNI, Polri and the paramilitary police unit, the Police Mobile Brigade (*Brigade Mobil*, Brimob), launched an attack on the compound. According to the indictment issued by Timor-Leste's Deputy Prosecutor General, more than 100 persons were killed during the attack and in its aftermath.

The attack on Manuel Carrascalão's house – An attack was launched by members of the BMP militia and TNI members on the house of a prominent pro-independence figure, Manuel Carrascalão on 17 April 1999. It followed a rally on the same day in front of the Provincial Governor's Office to inaugurate the militia umbrella group, Integration Fighters Force (*Pasukan Pejuang Integrasi*, PPI). At the rally the leader of the *Aitarak*, or Thorn, militia group and deputy chief of PPI, Eurico Guterres, openly incited the 3,000 to 5,000 militiamen present to kill independence supporters and singled out members of the Carrascalão family as traitors. At least 12 people were killed in the attack, including Manuel Carrascalão's stepson and individuals who were seeking sanctuary in the house from earlier militia attacks.

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[66] *Besi Merah Putih* or Red and White Iron, was one of the most notorious of the more than 25 militia groups operating in Timor-Leste Timor in 1999.

The attack on the residence of Bishop Belo - On the morning of 6 September 1999, armed militiamen attacked the residence of Nobel Peace Laureate, Bishop Carlos Felipe Ximenes Belo, where up to 5,000 people had taken refuge. Eyewitnesses have testified that TNI and Polri personnel were involved in ordering and directing the attack as well as in the subsequent arson which razed the whole compound. The precise number of people killed in the attack is not known.

The attack on the Suai Church – An attack took place on the Ave Maria Church compound, in Suai, Covalima District on 6 September 1999. It was led by members of the Laksaur and Mahidi militia groups,[67] but with TNI and Brimob members to the rear. At the time, around 1,500 people, including women and children, were in the compound, having sought refuge from a series of violent attacks in Covalima District over the past few days. The total number of people killed in the attack is unknown, but estimates range from 27 to 200.

The killing of Sander Thoenes – Sander Thoenes, a Dutch journalist was killed in Dili on 21 September 1999, allegedly by members of TNI battalion 745. Soldiers opened fire on him as he encountered their convoy on the outskirts of Dili. The driver of the motorcycle on which he was a passenger escaped, but Sander Thoenes was witnessed being dragged away by soldiers. His body was found the next day. He had been shot in the chest and his face had been mutilated.

The attack on the Dili Diocese Compound – On the morning of 5 September 1999, the day after the result of the referendum was announced armed Aitarak militia members gathered outside the Dili Diocese compound (*Câmara Eclesiástica*). Although observed by TNI and Polri personnel, the militia were not prevented from entering the compound firing their guns. Indeed, it is alleged several TNI and Polri members participated in the attack. The precise number of casualties is unknown, although the SCU investigation has established that at least 20 people, who were taking refuge in the compound, were wounded as a result of shootings, stabbings and beatings. Most of them were supporters or members of the pro-independence umbrella group, the National Council of Timorese Resistance (*Conselho Nacional da Resistência Timorense*, CNRT), student activists, or local UNAMET staff, who it appears were targeted in the assault. At least 15 people were killed or "disappeared".

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[67] Laksaur was the main militia group in Covalima District. Mahidi (or *Mati hidup demi integrasi*, Life or death for integration) was based in Ainaro District.

5.3 The missing cases

Those cases that were selected by the Attorney General for investigation pertained solely to the killings of civilians. While many of the crimes committed in Timor-Leste did involve killings, they did not do so exclusively. Torture and ill-treatment, rape and other crimes of sexual violence, forcible transfer of population and destruction of property have also been documented. Not one incident of any of these other crimes has been investigated or prosecuted in Indonesia.

Moreover, of the five cases initially selected, only four resulted in prosecutions (although the attack on the Dili Diocese was added later). One of the five original cases, that of the murder of the Dutch journalist, Sander Thoenes, was dropped. The Attorney General's Office claims that the case has not been closed, but has failed to adequately explain why the investigation was not pursued despite the wealth of information on this and other incidents which are directly related collected both by the Serious Crimes Unit in Timor-Leste[68] and by investigators from the Dutch police.[69]

The case is particularly significant because it involves not militia, but a TNI battalion, Battalion 745, which during its withdrawal from Lautem District in the east of the territory to Dili over a period of several days, visited violent revenge on the local population. During the rampage nearly two dozen people were killed and dozens of houses *en route* were burned or destroyed.

There were many other cases which should also have been investigated and, if there was sufficient admissible evidence, prosecuted, but which have been overlooked in the Indonesian process. The Suai case is one example. While it is true that the massacre at the Ave Maria Church on 6 September 1999 was the most serious incident to occur in the district, it was in fact part of a much wider pattern of human rights violations committed there throughout the year. In one indictment issued by Timor-Leste's Deputy General Prosecutor, 51 counts of crimes against humanity committed in Covalima District between January and October 1999 are recorded. They include charges of torture, persecution (by destruction of property), murder, enforced disappearance, attempted murder, extermination, persecution (abduction), rape and deportation.[70] However, no reference was made in the Indonesian indictments to any event in the district other than the attack on the church on 6 September 1999.

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[68] See: The General Prosecutor of Timor-Leste against Major Jacob Djoko Sarosa and Lieutenant Camilo Dos Santos, 6 November 2002.

[69] The results of the investigations into the killing of Sander Thoenes carried out by the Dutch Police and by the SCU were provided to Indonesia's Attorney General's Office.

[70] The Deputy General Prosecutor for Serious Crimes against Egidio Manek and 13 others, 28 February 2003.

Other major incidents where large numbers of civilians were killed or are missing include the attack on and around Maliana Police Headquarters on 8 September 1999 in which as many as 60 people may have been killed. Another example is the killing of around 100 people during the course of several days from 8 September 1999 in Passabe in Oecussi District. Hundreds of other smaller, but equally significant, incidents have also been ignored.

It is of particular concern that no cases of rape and other crimes of sexual violence have been investigated or perpetrators brought to trial. The full extent of such crimes is not known, but rape and other crimes of sexual violence were a feature of the human rights violations committed in Timor-Leste both before and during 1999 and the SCU has indicted a number of individuals for gender-based violence, including rape as a crime against humanity. However, Indonesia's record on addressing gender-based violence has been generally unsatisfactory, not only in Timor-Leste, but also in other areas where military operations have taken place, notably in the provinces of Nanggroe Aceh Darussalam and Papua.[71]

6. The Jakarta Trials

6.1 The legal basis for the trials in Indonesia

The legislative framework for the creation of the *ad hoc* Human Rights Court for East Timor was the result of a convoluted and painstaking process. After going through 11 drafts, Law 26/2000 on Human Rights Courts was adopted by the Indonesian legislature in November 2000. The law provided for the establishment of four permanent Human Rights Courts and, for cases which took place prior to the adoption of the legislation, the possibility of establishing *ad hoc* Human Rights Courts. The new courts were to have jurisdiction over crimes against humanity and genocide, crimes which until then had not been included in Indonesian domestic law.[72] The final law was improved in the course of the lengthy drafting process, however certain weaknesses still remain.[73] The following issues have been highlighted because of the direct impact they had on the trials of the Timor-Leste cases.

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[71] See, for example, the Report of the Special Rapporteur on violence against women, its causes and consequences, Mission to Indonesia and East Timor on the issue of violence against women. UN Doc. E/CN.4/1999/68/Add.3, 21 January 1999 and Amnesty International document: *Indonesia: The impact of impunity on women in Aceh*, November 2000 (AI Index: ASA 21/60/2000).

[72] War crimes are not included in the jurisdiction of the Human Rights Courts.

[73] For further analysis of Law 26/2000 see Amnesty International document: *Indonesia: Comments on the Law on Human Rights Courts (Law 26/2000)*, February 2001 (AI Index: ASA 21/005/2001).

6.2 Limited jurisdiction

While the establishment of a mechanism through which those responsible for past gross human rights violations could be brought to justice was positive, other provisions introduced into the law created the risk that political considerations could influence which past cases would be brought to trial and which would not.

An *ad hoc* Human Rights Court is established by a presidential decree on the recommendation of the lower house of parliament, the People's Representative Assembly (*Dewan Perwakilan Rakyat*, DPR). In the case of Timor-Leste, the DPR recommended the establishment of such a court. However, the then President, Abdurrahman Wahid, decreed that strict limits should be placed on its jurisdiction – specifically that it could only hear cases of violations that took place in the period *after* the 30 August 1999 referendum, thus excluding many hundreds of crimes committed throughout the year.[74]

After strong protests the jurisdiction was later amended by a second decree, Presidential Decree No. 96/2001, issued by the newly installed President Megawati Sukarnoputri in August 2001. Nevertheless, the jurisdiction remained unacceptably limited. In contrast to the mandate of the KPP HAM which covered the whole of Timor-Leste for the period from 1 January to 25 October 1999, the *ad hoc* Human Rights Court on East Timor was authorized only to hear cases that took place in April and September 1999. The jurisdiction was also further limited on the basis of locality: only cases that occurred within three of Timor-Leste's 13 districts would be heard. Thus, all prosecutions were based on events occurring in the districts of Liquiça, Dili and Suai in only the two months of April and September 1999.

Limiting the temporal and geographical jurisdiction of the court in this way compounded the problem resulting from the selection of the cases that made it unlikely that the trials would uncover the full extent of human rights violations in Timor-Leste in 1999, and the full extent of the involvement of military, police and government officials.

6.3 Independence of the prosecution

Under the UN Guidelines on the Role of Prosecutors, states are required to ensure that prosecutors can perform their professional functions without "*intimidation, hindrance, harassment, improper interference...*" (Guideline 5). The need to abide by such principles is all the more necessary in cases of breaches of international humanitarian law and human rights law, such as occurred in Timor-Leste, where state officials are likely to be among the suspects and where it might be perceived that the state has a vested interest in protecting defendants.

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[74] Presidential Decree 53/2001.

Systemic problems within Indonesia's judicial system, including the Attorney General's Office and Public Prosecution Service, have been well documented. They include the strong military culture, a lack of a culture of professionalism and independence and deep seated corruption.[75] In view of these and other problems which had the potential to impact on the independence of the prosecution, it was crucial that safeguards against political or other bias were built into the procedures contained in Law 26/2000.

Unfortunately, such guarantees of prosecutorial independence are not included in Law 26/2000. Instead, opportunities for political influence were built into the legislation through providing the Attorney General with sole authority to decide, on the basis of an initial inquiry carried out by Komnas HAM, whether to proceed with a criminal investigation and prosecution (Articles 21(1) and 23(1)). The Attorney General is further empowered to appoint an *ad hoc* investigator and an *ad hoc* public prosecutor (Articles 21(3) and 23(2)).

Because the Attorney General is a State Minister and a political official, there was a risk that the decision to open an investigation and to prosecute could be perceived as being politically motivated.[76] Although political influence in the Timor-Leste cases cannot easily be proven, when taking into account the limited number of cases investigated, the limited number of suspects put on trial and the manner in which the prosecutions were conducted, it is hard to avoid the conclusion that, at the very least, there was an extraordinary lack of commitment by senior officials in the Attorney General's Office to ensuring the success of these cases.

6.4 The selection of judges

Under the Law 26/2000, Human Rights Courts are composed of both career and non-career judges. The latter are appointed by the President on the recommendation of the

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[75] For a detailed account of problems within the Attorney General's Office and Public Prosecutors Service in Indonesia, see: *Intended to Fail. The Trials before the Ad Hoc Human Rights Court in Jakarta*, by Professor David Cohen, Director UC Berkeley War Crimes Studies Centre, edited by the International Center for Transitional Justice (ICTJ), August 2003. See also the Report on the Mission to Indonesia, 15-24 July 2002, of the Special Rapporteur on the independence of judges and lawyers. UN Doc. E/CN.4/2003/65/Add.2, 13 January 2003.

[76] Amnesty International recommended that such decisions should be made by the relevant prosecutor, subject to review by the Attorney General under strictly objective, legal criteria. See Amnesty International report: *Indonesia: Comments on the Law on Human Rights Courts (Law No.26/2000)*, February 2001 (AI Index: ASA 21/005/2001).

Chief Justice of the Supreme Court, which brings with it the risk that the independence and impartiality of the judges could be undermined by political considerations. The secretive way in which both judges and prosecutors were selected gave substance to this concern. The selection process was carried out behind closed doors without any public consultation. Suspicions among local human rights activists were increased when it became apparent that few of the judges selected had a background in international humanitarian and human rights law.

6.5 Victim and witness protection

Until 2000, Indonesia did not have a victim and witness protection system or recognize the rights of victims. It was, therefore, a significant development that Law 26/2000 provided that victims and witnesses of gross violations of human rights have the right to physical and mental protection from threats, harassment, terror, and violence and that such protection should be provided free of charge by the law enforcement and security apparatus (Article 34). The law does not go into detail on how such protection should be provided, but states that provisions should be elaborated elsewhere.

Accordingly, a Government Regulation – Government Regulation No.2 of 2002 in Respect of the Protection of Victims and Witnesses in the Gross Human Violation of Human Rights (Government Regulation on Victim and Witness Protection) was adopted. However, the provisions contained in the Government Regulation were weak and the speed with which they were introduced – the regulation was issued on 13 March 2002, just one day before the commencement of the first trial - made it highly probable that their application would be faulty.

Under the Government Regulation, there are just three options for protection in Section 4.

a. protection of the victims or witness' personal security from physical or mental threats;
b. confidentiality of the identity of the victim or witness;
c. giving evidence at the trial not in the presence of the accused.

Not all of these options are new: under Article 173 of the Code of Criminal Procedure (*Kitab Undang-Undang Hukum Acara Perdata*, KUHAP), the presiding judge may decide to hear a witness' evidence without the accused being present. The other avenues open to the court for witness protection does represent an innovation for the Indonesian justice system. However, their effectiveness was diminished in the Timor-Leste trials because adequate funding and facilities were not made available to implement an effective program. The lack of protection impacted on the decisions of Timorese witnesses to attend hearings in Indonesia and therefore on the availability of evidence.

7. The Indonesian indictments

A prosecution's case can stand or fall on the quality of the indictment. By outlining the facts and law at issue, an indictment in effect establishes the boundaries of the court's inquiry and its contribution to the effectiveness of the process is, therefore, fundamental. However, the indictments issued by Indonesia's Attorney General's Office on the Timor-Leste cases were among the weakest aspects of the process.

The indictments purport to prosecute crimes against humanity. The most widely recognized definition of crimes against humanity requires that they have been part of a widespread or systematic attack on a civilian population. That definition requires the prosecutors to prove beyond a reasonable doubt that the acts of the accused have been *"committed as part of a widespread or systematic attack directed against any civilian population"*.[77] In the case of Timor-Leste, which was under Indonesia's control at the time, this would strongly imply acts which were either part of Indonesian government policy, sponsored by it, or at least tolerated by it.[78]

The policy need not be explicitly formulated, nor does it need to amount to the actual policy of a state,[79] but can be *"deduced from the way in which the acts occur. Notably, if the acts occur on a widespread basis, that demonstrates a policy to commit those acts, whether formalized or not"*.[80] KPP HAM found such evidence (as subsequently has the SCU in Timor-Leste). The Attorney General's Office chose to ignore it.

The indictments were formulated in a manner that minimizes the defendants' culpability, mostly to a failure to control subordinates rather than active participation in violent acts, despite credible evidence to the contrary. In addition, the indictments minimized, if not eliminated altogether, any suggestion of government involvement, creating a picture of sporadic, isolated incidents, whereas in fact there was strong evidence of organized, systematic violence, in which the military, police and civil authorities played an active role.

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[77] Rome Statute of the ICC, Article 7(1).

[78] See for instance International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Kupreskic et al.,* Case IT-95-16, Judgment of 14 January 2000, para. 552; ICTY, *Prosecutor v. Tadic,* Case IT-94-1-AR72, Opinion and Judgment of 7 May 1997, para 648.

[79] ICTY, *Kupreskic* judgment, para. 551.

[80] ICTY, *Tadic* judgment, para. 653.

A comparison between the indictments issued by the Attorney General's Office with the information contained in the KPP HAM report and with the indictments prepared by the SCU for the Special Panels in Timor-Leste reveals the limits of the Indonesian indictments.

7.1 Comparison between Indonesian and Timor-Leste indictments

Examples of important differences between the allegations contained in the Jakarta and SCU indictments of the five cases are outlined below. These examples are based purely on allegations contained in the respective indictments.

Case	Jakarta indictment[81]	SCU indictment[82]
Attack on the Liquiça Church	• Around 100 members of TNI and Polri supported the BMP during the attack.	• The BMP was created and under the command and control of the civil administration and military authorities. Both TNI and Polri were involved in the planning and execution of the attack.
	• Figures given for number of deaths resulting from attack vary, but are consistently much lower that the SCU indictment. Twenty-two is the number usually sited, although in the indictment of Brigadier Timbul Silaen, 18 people are named as having been killed and in that of Colonel Suhartono Suratman's the number is 20.	• More than 100 persons were killed or injured during the attack on the church. Four others were killed and one "disappeared" during attacks in the surrounding area in the previous two days.[83]

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[81] Many of the indictments in the Jakarta trials cover the same events. General trends from the indictments will be discussed rather than specific examples from individual indictments.

[82] The SCU has issued a number of indictments that overlap with cases decided by the *ad hoc* Human Rights Court in Indonesia. In most of these cases the defendants are residing in Indonesia and cannot, because of the Indonesian government refusal to transfer them, be tried before the Special Panel.

[83] The General Prosecutor of UNTAET against Leoneto Martins and 20 others, 18 February 2002.

Attack on the house of Manuel Carrascalão	• Governor Abilio Jose Osorio Soares was the only high-level official in attendance at the rally at which participants were incited by PPI Deputy Commander, Eurico Guterres to kill CNRT leaders, including Manuel Carrascalão and his family.	• The TNI was instrumental in organizing the rally. The territory's three top officials, the Governor, Abilio Jose Osorio Soares, the Provincial Military Commander, Colonel Suhartono Suratman, and the Provincial Police Chief, Brigadier Timbul Silaen, as well as several District Chiefs (Bupati) were present at the rally.
	• There is no reference to TNI involvement in the attack in the early Jakarta indictments - eg Governor Abilio Jose Osorio Soares and Brigadier Timbul Silaen. Later indictments, including against Major General Adam Damiri and against PPI Deputy Commander, Eurico Guterres do refer to some TNI participation.	• Seventeen militia members and TNI personnel are named as having been involved in the attack. • 12 people were killed in the attack on the Carrascalão house. One other person was killed during attacks on other locations in Dili during the day. The attacks were carried out in the presence of Eurico Guterres and under his orders.[84]
Attack on the Dili Diocese Compound	• The indictments characterise the attack as being carried out by pro-integration supporters on pro-independence supporters, as a result of anger at having been defeated in the ballot.	• The attack was led by the commander of Aitarak Company D, Mateus de Carvalho. Polri took no action to prevent the attack. Several members of the TNI and Polri participated in the attack.
	• Figures for those killed ranged in various indictments between none and 46.	• At least 11 people were killed and four "disappeared" during or after the attack.[85]

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[84] The Deputy General Prosecutor against Eurico Guterres and 16 others, 18 February 2002.

[85] The Deputy General Prosecutor for Serious Crimes against Eurico Guterres, Mateus de Carvalho, Timbul Silaen and five others, 27 February 2003 & Deputy General Prosecutor for Serious Crimes against Wiranto and seven others, 22 February 2003.

Attack on the residence of Bishop Belo	- Figures for those killed range between none and 13. - The attack was carried out by pro-integration supporters. Some members of the TNI were also involved.	- At least one civilian was killed. TNI and militia ordered civilians to move to Dili harbour to be transported to West Timor and threatened to kill those who do not comply.[86]
Attack on the Ave Maria Church in Suai	- Generally alleged that 27 persons killed in the incident.	- Between 27 and 200 civilians were killed.[87]
	- The only attack referred to in the indictments is the attack on the Ave Maria Church in Suai.	- Widespread attacks are alleged in Covalima District by the Mahidi and Laksaur militia with the direct or indirect backing of members of the security apparatus and the civilian administration. One indictment lists 28 separate incidents that occurred in Covalima district between April 12 and October 6, 1999, not including the attack on the Suai church, in which militia acting alone or in conjunction with members of the TNI, killed a total of 54 civilians.[88] Another indictment relating to events in Covalima Districts contains 51 counts, involving crimes against humanity committed between January and October 1999.[89]

8. The suspects in the Indonesian cases

KPP HAM publicly identified 32 persons who fell into one of three categories of perpetrators: those responsible for specific crimes of violence on the ground; those with field responsibility for such crimes; and those with ultimate command responsibility. It recommended that these categories of perpetrators should be charged with a far broader range of crimes against humanity than the two, murder (Article 9(a)) and persecution or assault (Article 9(h)) that formed the basis of the charges in the Indonesian indictments.

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[86] The Deputy General Prosecutor for Serious Crimes against Eurico Guterres and seven others and the Deputy General Prosecutor for Serious Crimes against Wiranto and seven others.

[87] Deputy General Prosecutor for Serious Crimes against Colonel Herman Sedyono and 15 others and Deputy General Prosecutor for Serious Crimes against Egidio Manek and 13 others.

[88] Deputy General Prosecutor for Serious Crimes against Wiranto and seven others.

[89] Deputy General Prosecutor for Serious Crimes Against Egidio Manek and 13 others.

In the event indictments, were issued against only 18 people – 10 military and five police officers, two civilian government officials and a militia leader. The most senior official to be indicted was the Regional Military Commander Major-General Adam Damiri. The Indonesian authorities have not explained why others named in the KPP HAM report were not indicted.

Excluded were some of the higher ranking members of the armed forces that KPP HAM had recommended should be investigated. Among them were the most senior military officials of the time, including, General Wiranto (former Commander of the Armed Forces and Defence Minister) and Major-General Zacky Anwar Makarim (the Security Advisor to the Indonesian Task Force for the Implementation of the Popular Consultation on the Special Autonomy on East Timor). As already noted, both have since been indicted by Timor-Leste's General Prosecutor.[90] [For a full list of the 18 suspects see Appendix I].

By focusing primarily on what can be described as middle-level perpetrators with operational responsibilities and by drafting the indictments in terms which omit any charges that the accused themselves were responsible for acts of violence committed in Timor-Leste in 1999, the prosecutors created for themselves multiple burdens of proof: that there was a chain of command linking the accused to certain persons who committed crimes; that those persons committed crimes against humanity; and that the accused were criminally responsible for failing to exercise proper command responsibility of those subordinates.

None of the defendants were accused of planning or ordering the alleged crimes to be committed. Nor were they accused of any form of direct participation, even by way of aiding and abetting. Rather, the indictments alleged that the defendants were either accomplices to the commission of such crimes committed by others or, on the basis of command responsibility, had failed to prevent, stop or take steps to investigate and prosecute the commission of crimes against humanity committed by persons under their command or authority.

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[90] See: The Deputy General Prosecutor against Wiranto, Zacky Anwar Makarim, Kiki Syahnakri, Adam Rachmat Damiri, Suhartono Suratman, Mohammad Noer Muis, Yayat Sudrajat and Abilio Jose Osorio Soares, 22 February 2003.

9. The trial proceedings in the *ad hoc* Human Rights Court

Observations carried out by JSMP of the process in the first three trials in the *ad hoc* Human Rights Court did not indicate any problems with the rights of accused persons to a fair trial and due process. All accused had large and active teams of defence counsel, in particular those from the TNI, who sufficiently protected the interests of their clients. There were no indications that the Court was biased against the accused.

However observation of the first three trials and close monitoring of subsequent trials identified deeply disturbing patterns. The JSMP observer noted that the first three trials produced a spectacle in which the main fault lay with the prosecutors and in which the consistently low quality of the prosecution quickly became a feature. Lack of training and skills was clearly an issue, but the situation was so striking as to raise questions about whether the prosecution teams were in fact trying in good faith to mount cases designed to secure convictions.

Some of the most striking flaws of the trial proceedings identified by both the JSMP and other observers are elaborated below. Among the issues of particular concern are witness selection; the failure to introduce well-documented evidence regarding the incidents that the prosecution were authorized to investigate; and ineffective, incompetent and at times intimidating questioning of witnesses, especially victim-witnesses from Timor-Leste.

9.1 The courtroom atmosphere

The atmosphere and general surroundings at the Central Jakarta District Court, where the trials took place, were far from satisfactory. Amplification equipment was often faulty and there were no public notices of the time or place of the hearings.

There were large numbers of TNI, police and militia officials in the public gallery whose presence and behaviour may have had an impact on the performance of judges and prosecutors and was certainly intimidating for victim-witnesses.

Aggressive expressions of support or disapproval were delivered from the public gallery by members of the TNI, the militia and, to a lesser extent, members of Polri. Throughout the trials, members of TNI frequently attended in strength in cases where TNI members were among the accused. Conversations between the JSMP observer and some of the TNI members in the public gallery indicated they were being sent in order to show support for the accused. Different TNI representatives from different units would appear on successive days and they often seemed to have little knowledge of the cases or interest in the proceedings. Lunch was provided for them in the court building itself. Most wore formal uniforms, although some were in camouflage.

Hearings involving high profile witnesses such as General Wiranto and Major General Adam Damiri were often volatile, marked with noisy outbursts from the audience. On such occasions the public gallery was sometimes dangerously crowded and the atmosphere tense. Also present at some of the hearings were militia members, some wearing camouflage or Indonesia's national colours of red and white, others were in black t-shirts with the words "*victims of UN deception*" (*korban penipuan PBB*) printed on them. Banners were waved and their behaviour was often rowdy.

In interviews with the JSMP observer, several judges acknowledged that pressure tactics were being used in the public gallery but denied that this was having any effect on them.

9.2 Selection of witnesses by the prosecution

The choice of witnesses presented to the court by the prosecution was unbalanced and had the effect of weakening rather than strengthening the prosecution case. Out of a large pool of potential witnesses the prosecution chose to build its case by relying heavily on the testimony of Indonesian military and civilian officials, who had served in Timor-Leste.

Several of these witnesses were themselves defendants in other cases and thus had a particular interest in securing the acquittal of the accused. In the trial of Brigadier General Suhartono Suratman for example, six out of the 26 witnesses were themselves defendants in other trials before the *ad hoc* Human Rights Court. Only three of the 26 were victim-witnesses, compared to 18 who were TNI, militia or civilian officials.[91] Brigadier General Suhartono Suratman was among those defendants who were acquitted.

Even when prosecution witnesses were not themselves facing prosecution, they tended to support the official Indonesian version of events, and on occasions withdrew statements made to the investigation team where they might be taken not to support this version. In the first three trials, for example, with the exception of the three victim witnesses from Timor-Leste, all the prosecution witnesses who gave testimony defended the innocence of the accused.

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[91] See: ICTJ Report: *Intended to Fail. The Trials before the Ad Hoc Human Rights Court in Jakarta*, August 2003.

While it is the case that a significant number of victim-witnesses from Timor-Leste who were summoned decided not to appear, it is also true that the short notice given and inadequate security provided to them in Indonesia would have done little to encourage them to do so. In later trials some steps were taken to overcome security fears and practical difficulties involved in travelling to Jakarta by providing teleconferencing facilities from Timor-Leste.[92]

9.3 Failure by prosecution to summon key witnesses

As striking as the choice of witnesses who were summoned was the decision not to summon others. Although a larger number of victims/witnesses from Timor-Leste had been interviewed by the Attorney General's investigation team, in the first three trials victim-witnesses only testified on two of the incidents cited in the indictments, the Liquiça church massacre and the Suai church massacre. Thus, no victim-witnesses testified on the other three incidents: the attacks on the house of Manuel Carrascalão, on the Dili Diocese Compound and on Bishop Belo's residence.

In these trials, some witnesses refused to attend. Others such as Manuel Carrascalão, who had sought help from the military during the militia attack on his home on 17 April 2003 and who had been in telephone contact with his son shortly before he was killed in the attack, repeatedly conveyed his willingness to travel to Jakarta give testimony, but was not summoned.[93] There was also a large pool of other witnesses who might have been called to give testimony in these and later trials, but were not. They included UN staff, journalists and independent national and international observers of the ballot.

A similar pattern was repeated in later trials, where the vast majority of the witnesses were TNI, Polri or government officials or militia members. In the trials on which there is data no more than two or three victim-witnesses gave testimony, while witnesses from the TNI, police officers or other officials numbered in the teens. As witness testimony was the primary evidence before the Court, the failure to present appropriate witnesses severely restricted the prosecution's case. Not only did it result in not uncovering the truth of what occurred, but it meant that the version of events put forward by the defence went largely unchallenged.

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[92] A proposal by the Timor-Leste General Prosecutor's Office to facilitate witness testimony being given via teleconferencing facilities was initially blocked by the Indonesian Attorney General's Office on the grounds of cost and the supposed incompatibility of allowing testimony to be given in this way with the KUHAP. The proposal was made shortly after an Indonesian court agreed to use teleconferencing facilities to hear the testimony of former President Habibie in a corruption case against the speaker of the DPR, Akbar Tandjung, in July 2002. This appeared to establish a precedent which should have made possible the use of such technology in other cases. Subsequently, the *ad hoc* Human Rights Court did agree to hear testimony using teleconferencing facilities, and they were used to hear witnesses in the cases in December 2002 and January 2003.

[93] Manuel Carrascalão was summoned and did appear in person at the trial of Brigadier General Suhartono Suratman. He complained that he had been subjected to harassment while in Jakarta.

9.4 Hostile Treatment of Witnesses

The 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[94] provides that "*the responsiveness of judicial and administrative processes to the needs of victims should be facilitated*", including by "*allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected*" and "*taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety*". Moreover, this approach has been taken in Article 68 of the Rome Statute of the ICC.[95] In contrast, the specific treatment of individual victims-witnesses from Timor-Leste described below highlights the exposed position they found themselves in as a result of imperfect arrangements.

Although the Indonesian authorities had guaranteed to provide security for witnesses, there appeared to have been little understanding of what this entailed, and basic safeguards were absent. Among the many breaches were: the lack of security at airports; lack of secure accommodation; and lack of security in and around the Central Jakarta District Court – witnesses were forced to walk through public areas to enter the courtroom. Witness waiting areas were also insecure enabling members of the public, members of the defence teams and, on one occasion, the defendant and former militia leader Eurico Guterres himself to enter unchallenged.

The witnesses from Timor-Leste were also subjected to intimidating and at times humiliating treatment by the Court as the following examples illustrate.

Dominggas dos Santos Mouzinho, a survivor of the attack on the Ave Maria Church in Suai, is an uneducated villager from a remote part of Timor-Leste who testified on 28 May 2002 in the trial of Lieutenant Colonel Herman Sedyono and four others in the Suai case. Before the start of proceedings, she had asked the prosecution through UNTAET not to have to testify in the presence of the accused, as provided for under Section III, Article 5 of the Government Regulation on Victim and Witness Protection. It appears that this request was not conveyed to the Court.

The presence of an interpreter, provided by UNTAET, had previously been agreed between UNTAET and the Attorney General's Office. However, at the hearing the judge refused to allow the interpreter to appear on the grounds that he did not have "official accreditation" and because, in his view, the witness was fluent in Bahasa Indonesia and an interpreter was therefore not required. It quickly became apparent that Dominggas dos Santos Mouzinho was far from fluent in Bahasa Indonesia and was unable to understand many of the questions.[96] The combined effect of the intimidating manner in which questions were asked and her inability to fully understand what was being said was to undermine the credibility of the witnesses who often remained silent or gave confused and contradictory answers to questions.

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[94] UN General Assembly Resolution 40/34 of 29 November 1985.

[95] The Rome Statute has been signed by 139 states and ratified by 92 states.

The prosecution, who had called her as a witness, did not at any point raise an objection with the judge about the lack of interpretation. Nor did the prosecution object to the intimidating and frequently mocking manner in which she was questioned by lawyers for the defence. The judges also failed to exercise their responsibilities under Article 153 of KUHAP which requires them to "*to see that nothing shall be done or that no question shall be asked that will cause the defendant or witness not to be free in giving his answer*".

The following is typical of the exchange between the defence counsel and Dominggas dos Santos Mouzinho.[97]

Q: Your children, did they actively follow as officials in the Referendum, were there children of yours who followed?
A: Followed.
Q: Oo, so your children were with UNAMET? True madam? True madam, yes your children were chummy with UNAMET?
A: *No answer*
Q: Fatimah was working when you were examined two years ago, or before you became a witness? Do you remember before you became a witness or after you became a witness, do your remember madam? Witness first or Fatimah worked first?
A: *No answer*
Q: Madam can choose not to reply. This really is a 'sham court' (*pengadilan abu abu*), political court. False testimony, madam, in Indonesia, is punishable by seven years, to give false testimony. Sorry, but this concerns four TNI officers and police, their fate is to be accused. Beloved madam, I beg your honesty, Fatimah worked before you became a witness or after you became a witness? Don't look at the *bule* [white foreigner] on your right, I know he has been coaching you, don't look. Look at me if you need to, look at the judge, just listen no need for coaching. Beloved madam, was Fatimah working after you became a witness or before you became a witness?
A: *No answer*

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[96] She confirmed later to trial observers that she did not understand the questions.
[97] From unofficial transcripts compiled by JSMP's trial observer.

Q: Thank you, if you don't want to respond, I won't force you. But follow the conscience of your heart, my most beloved madam, were your daughters raped or about to be raped or wanting to be raped (*diperkosa atau mau diperkosa*) It's up to you if you don't want to answer, I am only talking about the pure inner self. Beloved madam.

Dominggas dos Santos Mouzinho was questioned in a similar manner for five hours without a break – she was not even offered a glass of water.

The prosecution treated another victim-witness, João Perreira, so aggressively, even though he was nominally a prosecution witness, that the presiding judge eventually asked the prosecutor to lower his voice. João Perreira, who appeared on 30 May 2002 in both the cases of the former Governor, Abilio Jose Osorio Soares and the Chief of Police, Brigadier General Timbul Silean, said that he had felt that he was on trial himself and would not appear as a witness again.

9.5 Hostile prosecution witnesses

The role of a prosecutor includes ensuring that the truth is uncovered, that the accused receives a fair trial and that the facts, both in favour and against the accused's case are brought before the court. However, the JSMP observer noted the prosecutors appeared to be actively supporting the case for the defence by providing testimony from prosecution witnesses which undermined the prosecution's own case and by not calling witnesses prepared to contradict these witnesses.

In many cases prosecution witnesses acted as *de facto* defence witnesses. The following examples are all taken from an unofficial transcript of the case against Brigadier General Timbul Silaen. In each instance, the prosecution witness provides information on the measures taken by the accused to prevent or investigate various incidents and thereby appears to support the innocence of the accused of the charges against him. There are examples of witnesses in other cases testifying to similar effect.

Example 1 - Examination in chief by prosecutor of Lieutenant Colonel Hulman Gultom[98] *about how accused Brigadier Timbul Silaen reacted to the Carrascalão incident:*[99]

Q: Did you report to Kapolda [Chief of Police]?
A: He wasn't at Kommando.
Q: Where was he?
A: I later learnt he went to Jakarta on work.
Q: So who did you deal with?
A: I dealt with the Deputy Police Chief for East Timor (Wakapolda). He ordered me to deal with the incident, localise the incident, not to let it spread to other places.
Q: Was it before or after the incident?
A: It was after, I couldn't call him during the incident. Afterwards, we had to think about the other pro-independence leaders. We had to anticipate the situation. I ordered my deputy to immediately send forces to Manuel's house when he called me. I didn't have to report to Kapolda, it was within my power and jurisdiction. I did it afterwards. I was dealing with the situation and so did not need to report while it was going on. Several hours later, I went to the airport to meet Kapolda and reported in detail on the day's incidents to him. Kapolda told me to carry out an investigation and secure the homes of pro-independence leaders so there would be no repeat.

Example 2 - Examination in chief by prosecutor of witness Hulman Gultom about the response of the accused, Brigadier General Timbul Silaen to the incident at the Dili Diocese.[100]

Q: What did he do after getting your report?
A: Kapolda ordered me to keep carrying out police duties, even though with very few personnel. Even with the few forces we had, we could do good.
Q: Did he go to check the crime scene?
A: That day, Kapolda took to the air in a helicopter to monitor the situation in Dili and around. He gave orders to me by HT even though it was bad reception, the orders were the same, keep doing your job, especially humanitarian tasks even though you've only got a few personnel.

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[98] Lieutenant Colonel Hulman Gultom was Commander of Police for Dili District; He was one of the subordinates for whose actions the Brigadier Timbul Silaen was held criminally responsible. Lieutenant Colonel Hulman Gultom was himself indicted under Article 42 of Law 26/2000 for responsibility for failing to prevent attacks in Dili in April and September 1999. He was convicted and sentenced to three years' imprisonment on 20 January 2003.

[99] From unofficial transcripts compiled by JSMP's trial observer.

[100] From unofficial transcripts contained in reports compiled by JSMP's trial observer.

9.6 Failure to challenge inconsistent statements

A number of witnesses made changes to statements made earlier to the Attorney General's Office. The amendments or retractions made were always to the benefit of the accused. In the Suai case[101] for example, where this phenomena was prevalent, it involved:

- Changing of the description of the incident from an attack to a brawl;
- Denying there was any TNI or Polri participation;
- Denying that TNI or Polri had any connection with the militias;
- Denying knowledge of the existence of militias or the identity of their leaders.

The judges and the prosecutors at no stage questioned whether the witnesses had come under pressure to change their statements. On the occasions when witnesses were asked why they had changed their testimony, they asked if there was coercion at the time of making the statement, not if there was coercion or undue influence to change the statement at a later date.

For example, in his testimony in the Suai case, Yopi Lekatompessy, the former Commander of the Suai Sub-district Police Sector, made several changes to the statement he had made for the Record of Examination. At the end of the testimony, the presiding judge asked him to explain the changes. The witness said that a combination of the speed of the questioning, lack of preparation and the fact that he had come from a distant region and was hungry accounted for the mistakes in his initial statement. At no stage was the witness asked if he had come under pressure or been otherwise persuaded to change the statement.

9.7 Failure by the prosecution to use documentary evidence

In addition to the evidentiary obstacles to meeting the burden of proof that were caused by the failure to summon appropriate witnesses, the trials were marked by the failure to introduce documentary evidence that was relevant and admissible.

Separate dossiers of evidence were submitted for each of the accused. In the dossiers that were examined for this report (those relating to the first three trials), very little of the documentary material that had been gathered in the course of KPP-HAM's investigations, or referred in its report, was attached. As a result, little of the extensive documentation used to support KPP HAM's findings, which were submitted to the

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[101] Case against Drs Herman Sedyono *et al.*

Attorney General's Office, reached the Court. Observers of later trials identified similar patterns.[102]

In addition to those documents that were believed to be in the possession of the Attorney General's Office, many relevant documents had been collected in Timor-Leste. These include reports by the relevant district military commands on the Liquiça church massacre and the events surrounding the attack on the home of Manuel Carrascalão.[103] In the course of the first three trials, many witnesses claimed that the attacks in Liquiça and Dili in April 1999 were investigated by the provincial Police Research Directorate (*Direktorat Reserse Polda Timor Timur*) and processed in due accordance with the law. When they appeared as witnesses, General Wiranto and Major General Adam Damiri claimed that TNI had also investigated allegations of TNI involvement in Liquiça and that an investigation team was set up, which found that there was no such involvement. The prosecutor and Court did not request the records of either the police or TNI investigations.

Similarly, reports compiled by the UN Mission in East Timor (UNAMET) on state collusion with militias between April and September 1999 (in some instances backed up with official Indonesian documentation) were not used. The UN Secretary-General made specific reference to this in a statement of 15 August 2002 in which he stated that: "*The United Nations reiterates its offer to make available to the Ad Hoc Human Rights Tribunal, upon request of the Indonesian authorities, evidence in connection with these or other relevant issues*".[104] This offer was never taken up.

There was also no mention of the reports of the ICIET or the UN Special Rapporteurs. Nor was there any use of information gathered and disseminated through the mass media, including newspaper reports, photographs and documentary film footage.[105]

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[102] Annex 3 of the ICTJ report: *Intended to Fail. The Trials before the Ad Hoc Human Rights Court in Jakarta*, provides a detailed list of available documentary material that was not produced at the trial of Brigadier General Mohammad Noer Muis. It includes decrees, instructions and communications from national and provisional level government officials, communications between military commanders, TNI situation reports, and a list of firearms held by the militia.

[103] These reports are reproduced as annexes in the Yayasan Hak report, *Laporan Investigasi Lima Kasus Besar Perlanggaran HAM Timor Lorosae 1999* (Dili, November 2001) under the titles: *Laporan Harian Seksi Intelijen Dim 1638/Lqs Periode tgl. 5-7 April 1999; and Salinan Laporan Harian Kodim 1627/Dili Mengenai Keadaan dan Penyerangan yang terjadi tanggal 17 April 1999 terhadap Ruman Manuel Carrascalão.*

[104] "Secretary-General endorses Human Rights Commissioner's concerns over Indonesian Tribunal" UN Press Release, UN Doc. SG/SM/8338. 15 August 2002.

[105] These reports are particularly valuable as sources of information on the formation of the militias in early 1999. See, for example, Karen Polglaze, "Indon Military Arms Paramilitary Groups in East Timor", Australian Associated Press, 27 January 1999; BBC World Service, "Paramilitaries Admit Their Weapons Are from ABRI", 5 February 1999; Australian Broadcasting Corporation, Four Corners, "A License to Kill", 31 March 1999.

9.8 Performance of judges sitting in the *ad hoc* Human Rights Court

The JSMP observer and observers of later trials reported that the performance of the judges was mixed. While there were no obvious indications during the trials that pointed towards *mala fide* or that the final outcome was determined in advance, some judges appeared less rigorous in challenging the prosecution or exploring evidence.

Many of the reported problems with the performance of the judges can be attributed to their lack of skills and training in conducting this type of trial. Indeed, judges with the *ad hoc* Human Rights Court informed the UN Special Rapporteur on the independence of judges and lawyers during his visit to Jakarta in July 2002, that they had received very little specific training on the international standards and international practice relevant to the prosecution of gross violations of human rights and crimes against humanity.[106]

While it cannot conclusively be shown that the intimidating atmosphere influenced the judges' conduct of the trial, the limited use of their extensive powers of examination may indicate that, despite their claims to the contrary, some were affected. In this regard, it is notable that on several occasions when hostile and disparaging remarks ("stupid judge", "kill the judge", "shut up") were heard from the audience, the judges ceased their questioning soon after. It appeared that judges who asserted their independence were the particular targets of such abuse and threats.

Under the Indonesian system, judges have an active role in examining witnesses and determining the truth of testimony before the court. Several judges were active participants, and asked relevant, pertinent questions, often making up for the inadequacies of the prosecution. Nonetheless, some of the shortcomings regarding the prosecution also applied to the judges. There was often extensive repetition on points of no great consequence; a failure to challenge inconsistencies, and questions on the main points of contention were frequently left unasked. While there was some outward effort not to take a particular view on the events of 1999 in Timor-Leste, questions at times revealed that some of the judges shared the commonly held view in Indonesia that there were two opposing groups of Timorese (pro-independence and pro-integration) and the Indonesian security forces which were trying to maintain peace between the two. Many questions also revealed a lack of familiarity with the dossiers and basic facts about Timor-Leste and the incidents being examined.

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[106] Report of the Special Rapporteur on the independence of judges and lawyers on the Mission to Indonesia 15-24 July 2002. UN Doc. E/CN.4/2003/65.Add.2, 13 January 2003.

9.9 The verdicts and sentences

Six out of the 18 defendants tried by the *ad hoc* Human Rights Court were found guilty of crimes against humanity. Those convicted and sentenced to three years' imprisonment were the Regional Military Commander, Major General Adam Damiri, the former Governor, Abilio Jose Osorio Soares, and the former Police Chief for Dili District, Lieutenant Colonel Hulman Gultom. The Military Commander for East Timor, Brigadier General Mohammad Noer Muis and the District Military Commander for Dili, Lieutenant Colonel Soedjarwo, were sentenced to five years imprisonment each. Eurico Gutteres, the Deputy Commander of the PPI and commander of the Aitarak militia received the longest sentence of 10 years.

All but Eurico Guterres were sentenced to terms of imprisonment below the specified minimum legal limit for these crimes – both of the two articles under Law 26/2000 with which all the defendants were charged, murder as a crime against humanity (Article 9a) and assault/persecution as a crime against humanity (Article 9h) carry a minimum prison sentence of 10 years. It is unclear on what legal basis the judges were able to ignore these provisions.

The conviction of Major General Adam Damiri was perhaps the most surprising. It had been assumed by many observers that, as the highest ranking military officer to stand trial, particular efforts would be made to shield him from a guilty verdict. Indeed, the suspect himself did not appear to treat the trial with the degree of seriousness that would have been expected, failing to turn up at several sessions because he was otherwise occupied with military duties in his position as Assistant for Operations to the Chief of the General Staff which involved planning and implementing the Military Emergency in the province of Nanggroe Aceh Darussalam (NAD).[107] Uniquely to this case, during the summing up the prosecution demanded an acquittal because they had not proved any of the charges on which the defendant had been indicted. The judges, in a demonstration of their independence, ignored the prosecution's demand and found the defendant guilty.

All those convicted remain at liberty pending the outcome of their appeals. In some cases, including that of Major General Adam Damiri, the defendants remain in active service in the military or police [See Appendix I]. The Supreme Court has upheld the acquittals of six people.[108]

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[107] A Military Emergency was declared in NAD on 19 May 2003, following the break down of cease-fire negotiations between the government and the pro-independence armed opposition group, the Free Aceh Movement (*Gerakan Aceh Merdeka,* GAM).

[108] Brigadier General Timbul Silaen and five defendants in the Suai case.

10. Implications of the trials in Indonesia

10.1 Ending impunity in Indonesia?

The direct consequences of the trials for the Timorese are all too clear: the victims have been denied justice and in many cases the architects of the crimes have not been held to account. It remains to be seen, however, what impact the failure of these specific trials will have on broader efforts to challenge impunity in Indonesia.

Amnesty International and JSMP recognize that a number of important legal and institutional developments have taken place in Indonesia as a consequence of the decision by the Indonesian government to bring persons accused of committing crimes against humanity in Timor-Leste to trial. In the performance of their first assignment the Human Rights Courts cannot be said to have engendered confidence in their ability to carry out a process capable of delivering justice, establishing the truth and providing full reparations. Nevertheless, these developments could serve as a basis for successful prosecutions in the future of perpetrators of human rights violations, but only if lessons learnt from the Timor-Leste trials are acted upon.

Investigations under the same legislation relating to gross human rights violations, which was applied for the first time in the Timor-Leste case, have since commenced into several other cases. In one case, that of the extrajudicial executions by the Indonesian military in the area of Tanjung Priok in the north of Jakarta in September 1984, the process has moved through the preliminary stages and trials began in September 2003.[109] At the time of writing, the trials of the 14 suspects in this case were continuing.

Already shortcomings similar to those that undermined the effectiveness and credibility of the Timor-Leste trials are emerging. There has been criticism, for example, that those who would have had senior command responsibility for the troops in Jakarta at the time have not been brought to trial. As was the case in the Timor-Leste trials, the more senior officials who were named as possible suspects by the KPP HAM on Tanjung Priok have not been prosecuted and there has been no explanation as to why.[110]

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[109] The number of people killed in the Tanjung Priok incident remains contested. The military claim that 18 people died; the KPP-HAM investigation concluded that at least 33 persons were killed and another 55 injured; while relatives of the victims have claimed that as many as 400 people may have died in the incident.

[110] They include, General (retired) Benny Murdani who was Commander of the Armed Forces in 1984 and General (retired) Try Sutrisno who was Commander of the Jakarta Military Command and who subsequently became Vice-President (1993-1998).

Concerns about the security of witnesses have also been reported. According to a local NGO, The Commission for Disappearances and Victims of Violence (*Komisi untuk Orang Hilang dan Korban Tindak Kekerasan*, Kontras) some 20 witnesses sought police protection in October 2003 after receiving death threats allegedly from members the elite military unit, Special Forces Command (*Komando Pasukun Khusus*, Kopassus). The intimidation was apparently intended to prevent them from testifying at the trial of Major General Sriyanto, who is currently the Commander of Kopassus, but was Chief of Operations at the North Jakarta Military Command when the Tanjung Priok incident took place. In the meantime, settlements consisting of cash payments have reportedly been brokered between some of the victims and senior military officers. Witnesses for the prosecution who have accepted the settlement have since retracted earlier testimony that had been damaging to the military.

In a second case, known as the Abepura case, 25 people were identified as possible suspects by the KPP HAM Papua/Irian Jaya in the extrajudicial execution of one person and arbitrary detention and torture of scores of others in Abepura, Papua Province in December 2000.[111] Among them was the then Police Chief for Papua Province, Brigadier General Sylvanus Wenas. The Attorney General's Office has named just two people as suspects.[112] Although both the suspects are police officers, Brigadier General Sylvanus Wenas is not among them. At the time of writing the Attorney General's Office had not issued indictments against the suspects in this case, even though its investigation was completed over one year ago.[113]

At an early stage in the Abepura case, KPP HAM Papua/Irian Jaya's investigations were obstructed by local officials, prompting the investigation team to issue a statement in which it protested that members of the security forces were not providing information and were covering up the facts. The KPP HAM team also complained publicly that the witnesses had been intimidated by police questioning of those that gave testimony to the inquiry.

The fact that similar problems are emerging in both the Tanjung Priok and Abepura cases indicates that the failure of the Timor-Leste trials did not result only from the particular political sensitivities surrounding them, but are more deeply rooted in the justice system. With respect to these and other cases that are in progress or pending, urgent measures should be taken to ensure that justice for the victims and their families is not jeopardized as it has been in the Timor-Leste cases.

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[111] Two people died in police custody allegedly as a result of torture.

[112] The two suspects are the Commander of a Brimob Unit stationed in Papua at the time, Brigadier General Johny Usman and the Deputy Police Commander for Papua Province, Adjunct Senior Commissoiner Daud Sihombing.

[113] According to Law 26/2000 on Human Rights Courts, prosecution must be completed within no more than 70 days from the date of receipt of the investigation findings (Article 24).

10.2 International response to the trials in Indonesia

In contrast to the strong pressure exerted on Indonesia in 1999, the international response to concerns surrounding the trials in Indonesia has been disappointing. After the verdicts in the first three trials were handed down in August 2002, there were protests from the UN Secretary-General and High Commissioner for Human Rights as well as from various individual governments about the manner in which they were conducted. As time went by, the protests became more muted, such that one year later in August 2003 when Major General Adam Damiri was convicted and sentenced to three years' imprisonment, the UN said nothing publicly, even though the Indonesian authorities had clearly done nothing to address concerns that had emerged in the earlier trials.

This lack of sustained pressure undoubtedly contributed to a belief among some in Indonesia, that it was sufficient simply to go through the motions of holding trials and that their content was of little consequence. So, while ultimate responsibility for the failure of the Jakarta trials rests with the Indonesian authorities, the UN, and the international community more broadly, must also bear some responsibility for having failed to apply strong and consistent pressure on Indonesia to deliver on its commitments.

It is, however, worth recalling some of the strong statements that have been made by senior UN officials in the past and to question why, in the light of the concerns raised, more was not done by the UN Secretary-General, the Security Council, the High Commissioner for Human Rights and the Commission on Human Rights, to persuade Indonesia to take the steps necessary to ensure the success of the trials.

In August 2002, the then UN High Commissioner for Human Rights, Mary Robinson, who was visiting Timor-Leste at the time, publicly stated her dissatisfaction with the first three trials and warned in interviews with the media that if Indonesia failed to deliver justice there should be an international tribunal.[114] The dissatisfaction of the High Commissioner for Human Rights with the proceedings was echoed by the UN Secretary-General who also denied the suggestions by judges, prosecutors and defendants that there were irregularities in the conduct of the UNAMET mission.[115]

Mary Robinson's successor, the late Sergio Vieira de Mello, also expressed serious reservations about the conduct of the trials. In his report to the 59th Session of the UN Commission on Human Rights (UN CHR) in March 2003, he criticized "*the limited geographical and temporal jurisdiction of the Court; the lack of experienced prosecutors and judges; the intimidating and, at times, hostile, courtroom treatment of Timorese witnesses by some judges, prosecutors and defence counsel; the causes and consequences of non-attendance of Timorese witnesses at the proceedings; and the lightness of the sentences imposed, which bear no reasonable relationship to the gravity of the offences committed*". [116]

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[114] "UN's Robinson calls for international court for East Timor", *Reuters*, 25 August 2002.

[115] "Secretary-General endorses Human Rights Commissioner's concerns over Indonesia Tribunal", UN Press Release of 15 August 2002, UN Doc: SG/SM/8338.

The High Commissioner for Human Rights also noted that the prosecution's case and the integrity and credibility of the trial process were undermined by the "*failure to put before the court evidence that portrayed the killings and other human rights violations as part of a widespread or systematic pattern of violence*".[117]

Given these clearly articulated concerns by the High Commissioner for Human Rights, it was surprising that the UN CHR in its 2003 session, chose not to consider a resolution criticizing Indonesia's approach to the trials, but in a weakly worded Chairperson's statement only expressed in general terms disappointment at the way the trials were carried out and "encouraged" the government to take necessary steps to improve the process to ensure justice.[118] Because the statement did not specify the shortcomings which had vitiated the process and did not indicate how it would respond if the Indonesian legal process was not improved, it was widely understood, including by the Indonesian government itself, as meaning that the UN CHR was in effect absolving itself of any further responsibility for bringing the Indonesian government to account for the events of 1999.

This perception was reinforced by the subsequent silence from the UN, including the acting High Commissioner on Human Rights and the UN Secretary-General, at the completion of the trials of first instance in August 2003. Disappointment was, however, expressed by a number of individual governments. For example, a spokesperson for the US State Department noted that "*the overall process of the tribunal has been flawed and lacked credibility*".[119] The European Union, in a Declaration by the Presidency, stated that the trials "*have failed to deliver justice and did not result in a substantiated account of the violence*".[120]

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[116] Commission on Human Rights, Situation of Human Rights in Timor Leste, Report of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2003/37, 4 March 2003, para. 52.

[117] *Ibid.*, para. 55.

[118] Draft Report of the UN Commission on Human Rights, 2 May 2003, UN.Doc. E/CN.4/2003/L.10/Add.9, para. 99.

[119] "*US Disappointed with Indonesian rights tribunal, Timor activists rage*", AFP, 5 August 2003.

[120] Declaration by the Presidency on behalf of the European Union on the *ad hoc* Human Rights Tribunal for crimes committed in East Timor, 6 August 2003.

11. The way forward

11.1 The UN's role and responsibility in delivering justice to Timor-Leste

When the UN Secretary-General delivered the report of ICIET in January 2000 to the UN Security Council and General Assembly he stated that he would "*closely monitor progress*" of the response to the crimes in Timor-Leste in order to see that it was a "*credible response in accordance with international human rights principles*".[121] Demonstrating his ongoing support for justice, the UN Secretary General stated in October 2003 that "*I firmly believe that the perpetrators of serious human rights violations in 1999 in Timor-Leste must be brought to justice*".[122]

It is evident that having undertaken a process that was as comprehensively flawed as that described in this report, Indonesia has fallen well short of the standard set by the UN Secretary-General. In view of the seriousness of the problems there should be no further proceedings in Indonesia in relation to 1999 events in Timor-Leste until problems in the current system have been corrected. It is also clear, that despite the continued efforts to investigate and prosecute serious crimes in Timor-Leste itself, there are limitations to what can be achieved through this process.

At this critical juncture, Amnesty International and JSMP urge the UN Secretary-General, the Security Council, the High Commissioner for Human Rights and the Commission on Human Rights to implement their commitment to justice for crimes committed during 1999 in Timor-Leste, by considering the available alternatives.

A first practical step would be to establish an independent Committee of Experts to review the processes in both Indonesia and Timor-Leste. The purpose of such a review would be to evaluate the progress of investigations and prosecutions; to identify the technical and political obstacles to the process; and to make recommendations to the UN Security Council on what further measures are required to ensure that credible and effective investigations and trials take place within the shortest possible time.

The review should explore the strengths and weaknesses of the full range of alternatives, including an international criminal tribunal. It should be carried out by independent legal experts of high standing who should be mandated to provide a detailed review of both the legal processes and of the broader legal, institutional and political environments in which they are taking place.

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[121] UN Doc. A/54/726, S/2000/59, 31 January 2000.

[122] Report of the Secretary-General on the United Nations Mission of Support in East Timor, UN Doc.S/2003/944, 6 October 2003.

The idea of such a review is not new, and it is Amnesty International and JSMP understanding that it has been the subject of discussions within the UN. However, at the time of writing it had not been established.

11.2 Objectives of a justice process

There are four main objectives to pursuing justice for Timor-Leste. First victims of serious violations and their relatives must obtain justice and receive full reparations, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. Second, in the wider interests of reconciliation and ending impunity, the process should provide a full and truthful account of the events that took place in Timor-Leste 1999. Third, perpetrators of serious crimes, including crimes against humanity must be held to account for their actions in accordance with international law. Finally, an effective justice process should contribute to preventing such crimes from occurring in the future.

11.3 Fundamental principles

In pursuing these objectives fundamental principles must be applied, without which the rights of victims or suspects, or both, will be jeopardized.

- ***No selectivity*** – The principle of no impunity should apply to everyone and not be selective on the basis of nationality, official status, including rank or any other ground;
- ***No time limits*** – Crimes under international law and other grave violations of human rights violations must be brought to justice, regardless of when the crimes occurred;
- ***No amnesties*** – There should be no amnesties, pardons, or similar measures for crimes under international law, if such measures would prevent the emergence of the truth, a final judicial determination of guilt or innocence or full reparation for victims and their families;
- ***Fair trials*** – Suspects should be brought to justice in proceedings that fully respect international law and standards for fair trial at all stages of the proceedings;
- ***No death penalty*** – There should be no recourse to the death penalty or other form of cruel, inhuman or degrading punishment, whatever the circumstances;

- ***Reparation for victims*** – The rights of victims and their families to all forms of reparations and to effective means to seek such reparations must be given;
- ***No refoulement*** – No suspect should be handed over to a country if at risk of serious human rights abuses. In particular, suspects should not be handed over unless satisfactory guarantees are given that the death penalty or other cruel, inhuman or degrading punishment would not be imposed and that they will receive a fair trial.

11.4 Options for consideration

A number of different models have been, or are currently being, applied by the international community to provide justice for past grave human rights violations in various different settings. The most prominent are the two *ad hoc* international criminal tribunals for the former Yugoslavia and for Rwanda established in 1993 and 1994 respectively. A more recent development has been the establishment of internationalized courts in which both national and international judges sit. This model is currently being pursued in Sierra Leone, Cambodia, Kosovo, and in Timor-Leste itself. A third option is that the courts of other states exercise universal jurisdiction to bring to trial perpetrators of crimes under international law.

Experience shows that, whatever model is applied, justice can never be delivered quickly or cheaply. It is essential, therefore, that decisions should not be driven by budgetary factors or dictated by short-term planning. Nowhere has the pitfalls of such an approach been more clearly illustrated than with respect to the Special Court for Sierra Leone. Funding shortfalls initially resulted in delays in its establishment. By 2003, in its second year of operation, the Special Court faced a financial crisis so severe that its functioning could not be guaranteed beyond the end of the year. Although this immediate crisis was averted after appeals for additional contributions, some of the shortfall for the second year was met by bringing forward contributions from the third year, aggravating the serious shortfall already projected for the third and planned final year. Both the international criminal tribunals for the former Yugoslavia and Rwanda have also been plagued by inadequate and short-term funding.

Similarly, the integrity of the legal process should not be jeopardized by allowing international or national political factors to influence the decision. Cambodia is a case in point, where the highly politicized nature of the negotiations over the establishment of a mechanism to bring to justice suspected perpetrators of war crimes, crimes against humanity and genocide and other grave human rights violations from the *Khmer Rouge* period has resulted in an agreement between the UN and the

Cambodian authorities that risks resulting in trials that do not conform to international standards of fairness.[123]

These and other examples highlight the potential risks of allowing short-term or purely pragmatic considerations to dictate the way forward. In the view of Amnesty International and JSMP it is imperative that various options are considered first and foremost in terms of the extent to which they meet the objectives outlined above.

The two organizations believe that careful consideration of all the possible options is required and that the various options may not necessarily be mutually exclusive. As a starting point it is necessary to look at what further can be achieved through the serious crimes process in Timor-Leste. Despite the limitations there is still much work that can be done here. Amnesty International and JSMP therefore believe that the SCU and Special Panels should be provided by the UN Security Council with both the mandate and resources necessary to complete investigations into *all* the crimes on which it is able to gather evidence and to bring to trial *all* of those suspects who it can feasibly apprehend.

The ability of the Special Panels in Timor-Leste to complete their task will, however, remain limited unless Indonesia changes its position on cooperation. Other mechanisms may therefore be required. Among the options that must be seriously considered is the international criminal tribunal recommended by both ICIET and the three UN Special Rapporteurs.

11.5 An international criminal tribunal?

There can now be little confidence in the feasibility of trials in Indonesia in the foreseeable future being able to satisfy international standards requirements for fair trial even with considerable international support. To do so would require not only substantial reform of the Human Rights Courts, but of the whole justice system which the Special Rapporteur on the independence of judges and lawyers has described as lacking a culture of independence and rife with corruption.[124] Moreover, the multiple problems with the previous trials make it unlikely that any of the victims or their families would have even minimal confidence in a process in which Indonesian officials are involved. Amnesty International and JSMP believe that because the problems with the *ad hoc* Human Rights Court were so serious and most, if not all of the results unsatisfactory, other steps must be taken to ensure that there is no impunity with respect to the crimes committed in Timor-Leste.

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[123] Amnesty International has documented in detail its concerns about the proposal to establish internationalized panels in Cambodia, including in: *Kingdom of Cambodia: Amnesty International's position and concerns regarding the proposed "Khmer Rouge" tribunal*, April 2003 (AI Index: ASA 23/005/2003). The decision to proceed with the this model was contrary to the advice of the Group of Experts for Cambodia, established by the UN to evaluate existing evidence of gross violations and propose further measures to address the issues of individual accountability and national reconciliation, which recommended an international criminal tribunal. See: *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135. Annex to: Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council.* UN Doc. A/53/850, S/1999/231, 16 March 1999.

One option is an international criminal tribunal. This model could substantially further the process of achieving the four objectives of justice, reparations, accountability and truth. It is likely that it would have an important catalytic effect both of encouraging Indonesia to cooperate with the serious crimes process in Timor-Leste and of undertaking reform of its own justice system so that effective and credible trials of perpetrators of grave human rights violations could eventually be held domestically. It might also encourage steps to discover the truth about what occurred and to provide reparations to victims and their families.

However, it is likely that an international criminal tribunal would face many obstacles, not least securing the cooperation of the Indonesian authorities. It would be significantly more expensive than national courts and would be likely to focus only on a limited number of persons suspected of bearing the greatest responsibility for crimes against humanity and other serious crimes committed in Timor-Leste during 1999 and exclude those responsible for the many thousands of grave human rights violations committed during a quarter of a century of Indonesian rule.

In view of the possible limitations of *ad hoc* international tribunal, it will also be necessary for other options to be considered, such as trials in third countries, which might supplement or provide an effective alternative to an international criminal tribunal.

Each state has a duty to ensure that other states investigate and, where there is sufficient admissible evidence, to prosecute crimes under international law. These crimes are contrary to *jus cogens* prohibitions and the obligation to bring those responsible to justice is an obligation *erga omnes* owed by the entire international community. Genocide, crimes against humanity, war crimes, and specific crimes such as extrajudicial executions, "disappearances" and torture, are now recognized as crimes over which states not only have the power to exercise universal jurisdiction, but often have the duty to do so or to extradite suspects to states willing to exercise jurisdiction.

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[124] Special Rapporteur on the independence of judges and lawyers, Report on the Mission to Indonesia, 15-24 July 2002. UN Doc. E/CN.4/2003/65/Add.2, 13 January 2003.

Many states have enacted legislation permitting their courts to exercise universal jurisdiction over crimes against humanity, war crimes and other crimes under international law.[125] Moreover, courts in a number of countries, have exercised universal jurisdiction, including over grave crimes under international law committed in the former Yugoslavia and in relation to genocide, crimes against humanity or war crimes committed in 1994 in Rwanda. In the case of Rwanda, investigations and prosecutions were begun in a number of countries in response to a UN Security Council resolution urging states to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or other authority, persons found within their territory against whom there was sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda.[126] Amnesty International and JSMP believe that the Security Council should similarly urge all states to arrest and detain where feasible individuals suspected of committing crimes in Timor-Leste in 1999 with a view to transferring them to Timor-Leste for trial or bringing them to trial in their own national courts.

11.6 Avoiding double jeopardy in future trials

It has been suggested that those individuals who have already been brought to trial in the *ad hoc* Human Rights Court in Indonesia cannot be subjected to another judicial process for the same crimes in accordance with the principle of *ne bis in idem* (also known as the prohibition of double jeopardy).[127]

However, the principle applies only with a single jurisdiction and current international law does not recognize this principle as barring a second prosecution in another country for the same conduct that was the subject of final judgment.[128] This limitation of the scope of the principle of *ne bis in idem* ensures that the courts in a second state can act effectively as agents of the international community repressing crimes under international law when courts in other states fail to fulfil their responsibilities. Indeed, the International Law Commission, a body of experts established by the UN General Assembly to codify and progressively develop international law, has declared in its commentary on the Draft Code of Crimes against the Peace and Security of Mankind in 1996 that "*international law* [*does*] *not make it an obligation for States to recognize a criminal judgment handed down in a foreign State*". It added that where a national judicial system has not functioned independently or impartially or where the proceedings were designed to shield the accused from international criminal responsibility, "*the international community should not be required to recognize a decision that is the result of such a serious transgression of the criminal justice process*".[129]

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[125] However, the failure to incorporate international law on crimes against humanity and other crimes under international law does not excuse a state from investigating and prosecuting such crimes.

[126] Security Council Resolution 978, 27 February 1995

[127] Article 14(7) of the ICCPR provides that "*No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country*".

[128] The Human Rights Committee has concluded that Article 14 (7) of the ICCPR "does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State." *A.P. v. Italy*, No. 204/1986, 2 November 1987, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 67, UN Doc. CCPR/C/OP/2, UN Sales No. E.89.XIV.1. This was also recognized during the drafting of Article 14 (7) of the ICCPR. See Marc J. Bossuyt, *Guide to the* "Travaux Préparatoires" *of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff 1987), pp. 316-318; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N.P. Engel 1993), pp. 272-273; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press 1991).

12. Recommendations

On the basis of this report Amnesty International and JSMP make the following recommendations:

General

- All those responsible for committing crimes in Timor-Leste in 1999, and eventually for the whole period of Indonesia's occupation, should be brought to justice. Every crime should be thoroughly, independently and impartially investigated and, where there is sufficient admissible evidence, prosecuted.

- The rights of suspects and accused to a fair trial should be fully respected at all stages of the proceedings.

- The right of victims and their relatives to full reparations, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition should be guaranteed and they should have effective means to obtain such reparations. Where reparations require expenditures, sufficient funds must be made available.

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[129] Report of the International Law Commission's 48th session – 6 May to 26 July 1996, UN Doc. A/51/10, 1996, p. 76.

To the UN Security Council

- ***An independent review*** - An independent review should be established to evaluate the progress of judicial proceedings in both Indonesia and Timor-Leste. It should identify the technical and political obstacles to the process with a view to recommending a single court, or combination of courts, that would ensure that credible and effective investigations and trials take place promptly. Particular consideration should be given to the recommendation of ICIET and the three UN Special Rapporteurs to establish an international criminal tribunal as one component of the effort to bring to justice all those responsible for crimes under international law in Timor-Leste regardless of when they occurred.

- ***Continuation of work of Special Panels in Timor-Leste*** – The process in Timor-Leste of investigating and prosecuting serious crimes committed in 1999 should not end, until it has completed as far as is possible the task with which it has been mandated or there is an effective and credible process in place to replace it. The UN Security Council should ensure that there is an explicit mandate for continuing support to the SCU and Special Panels after UNMISET's mandate expires in May 2004.

- ***Measures to strengthen SCU and Special Panels*** – The SCU should be provided with resources to hire sufficient numbers of experienced international investigators and prosecutors and other necessary staff to support the work of the Timor-Leste Prosecutor General in completing investigations and prosecutions into crimes committed both during 1999 and, eventually, in previous years in Timor-Leste. Support should also be given to strengthening the Special Panels, including ensuring that suitably qualified international judges are recruited and retained for sufficiently long periods to carry out their duties effectively; that the defence is strengthened; and that court interpretation and administration is improved.

- ***Pressure on Indonesia to cooperate with the Special Panels*** – Pressure should be applied on Indonesia to cooperate with the serious crimes process in Timor-Leste, including by transferring for trial by the Special Panels individuals who have been indicted by the Timor-Leste General Prosecutor.

- ***Funding*** – The Special Panels in Timor-Leste, an international tribunal and/or any other alternative or supplementary justice process must be provided with sufficient and sustained funding to carry out is mandate in accordance with the highest international standards.

- ***Strengthening the Timor-Leste justice system*** – Continued support should be provided to the strengthening of Timor-Leste's criminal justice system.

To the UN Commission on Human Rights

- ***Resolution on impunity in Indonesia*** – The UN CHR should demonstrate its commitment to ending impunity in Indonesia and to ensuring justice for the victims in Timor-Leste by: strongly condemning the conduct of the trials in the *ad hoc* Human Rights Court on East Timor; supporting the continuation of the work of the Special Panels in Timor-Leste, while emphasizing the need for additional resources to ensure that the Special Panels meet international standards for fair trial; recommending that the UN Security Council takes immediate action to ensure that effective alternatives to the Indonesian process are put in place; and demanding that Indonesia cooperate fully with such a process.

- ***Continuing work of Special Rapporteurs*** – The UN CHR should encourage the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on torture, the Special Rapporteur on violence against women, its causes and consequences, and the Special Rapporteur on the independence of judges and lawyers to visit the area again. Such visits would take place with a view to making a fresh assessment as to the current situation, and the steps now needed to be taken by all concerned to ensure justice for Timor-Leste. Indonesia and Timor-Leste should be encouraged to facilitate such visits.

To the Indonesian Government

With regard to trials of persons accused of serious crimes committed in Timor-Leste in 1999:

- ***Enforcing sentences and removing suspects from active duty*** – Sentences handed down by the *ad hoc* Human Rights Court on East Timor should be enforced. In addition, all military or police officers who have been indicted by the Timor-Leste Prosecutor General should be suspended from active duty pending the outcome of criminal proceedings to determine whether or not they are guilty of the charges against them.

- ***Cooperation with the Special Panels in Timor-Leste*** – Indonesia should extend its full cooperation with judicial proceedings being conducted in Timor-Leste, including entering into extradition and mutual legal assistance agreements. Such cooperation should include extraditing suspects against whom there are indictments to Timor-Leste or to other states able or willing to prosecute and punish crimes against humanity, war crimes and other serious crimes in fair trials without the death penalty.

- ***Cooperation with the UN review*** – Indonesia should cooperate fully with any review of the trials in the *ad hoc* Human Rights Court on East Timor undertaken by the UN and with any mechanism established as a result of such a review.

With a view to ensuring that future trials of serious crimes are consistent with international law and standards:

- ***Reform of the law on Human Rights Courts*** – The Law on Human Rights Courts (Law 26/2000) should be amended so that it is fully consistent with international law and standards.

- ***Reform of the justice system*** – Efforts to reform the justice sector should be accelerated. This should include the implementation of recommendations made by the UN Special Rapporteur on the independence of judges and lawyers and by other UN experts.

- ***Strengthen protection for victims and witnesses*** – Effective measures should be taken to ensure that victims and witnesses for both the defence and the prosecution are protected from harm, unnecessary anguish and intimidation. These measures should encompass, where necessary, protection before, during and after a trial, until the security threat ends. Protection should also be provided to investigators, judges, prosecutors and others connected to the proceedings.

- ***No amnesties*** – There should be no provision for amnesties in legislation providing for the establishment of a Truth and Reconciliation Commission in Indonesia. Under no circumstances should amnesties, pardons or similar measures be given for crimes under international law, if such measures would prevent the emergence of the truth, a final judicial determination of guilt or innocence and full reparation for victims and their families.

To the Timor-Leste government

- ***Fulfil obligations to end impunity*** – The government of Timor-Leste should fulfil its duty to bring to justice perpetrators of crimes under international law and to cooperate with other states endeavouring to do so. In fulfilling this obligation the government should:
  - ➢ Request that the UN Security Council continue its support for the SCU and Special Panels;
  - ➢ Request that sufficient funding and resources, including experienced investigators, prosecutors, judges and defence lawyers, are provided by the international community to ensure the continued and effective work of the SCU and Special Panels;
  - ➢ Urge other states to enter into extradition and mutual legal assistance agreements with Timor-Leste to enable individuals against whom indictments have been issued to be extradited to Timor-Leste for trial by the Special Panels;
  - ➢ Continue its own efforts towards strengthening the criminal justice system in Timor-Leste and seek international and funding and supporting for this process.

- ***Ensure fair trial rights*** – The Timor-Leste government should ensure, both in law and in practice, that the human rights of those suspected or convicted of crimes under its control are respected, including the right to prompt access to legal counsel, frequent judicial review of detention orders, trials conforming to international standards and humane conditions of detention or imprisonment.

To the governments of other states

- ***Contributing funds and resources*** - States should be prepared to provide any court established by the UN to resolve crimes committed in Timor-Leste in 1999 and in previous years with the necessary support, including funding, technical assistance and expert personnel. This includes providing such support to the Special Panels in Timor-Leste so as to accelerate and improve their work.

- ***Cooperation with Timor-Leste Special Panels*** – All states should cooperate fully, under the principle of universal jurisdiction, with judicial proceedings relating to the 1999 and previous events in Timor-Leste, including those currently being carried out by the Special Panels in Timor-Leste. Such cooperation should extend to the arrest, extradition and punishment of persons responsible for crimes against humanity and other serious crimes under international law.

- ***Enacting legislation*** - All states should enter into effective extradition and mutual legal assistance agreements with Timor-Leste to facilitate the prosecutions and trials, in accordance with international fair trial standards, of all suspected perpetrators of crimes against humanity and other serious crimes under international law.

- ***Exercise universal jurisdiction*** – All states should adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with universal jurisdiction persons responsible for, or accused of war crimes, crimes against humanity, genocide and other crimes under international law.

- ***Support for judicial reform in Indonesia*** – Donor states should give priority to providing assistance for strengthening Indonesia's justice system, including to strengthening the Human Rights Courts.

- ***Support to strengthen the justice system in Timor-Leste*** – Donors states should continue to provide assistance to rebuilding and strengthening the justice system in Timor-Leste.

Appendix I *Individuals tried in the ad hoc Human Rights Court on East Timor in Indonesia*

Name	**Position and rank in 1999**	**Charges**	**Sentence and date of sentence**	**Current position**	**Other information**
Abilio Jose Osorio Soares	Governor of East Timor (1992 – 1999)	Murder as a crime against humanity in violation of Art. 9(a) of Law 26/200 using Art. 42(2) on civilian/police command responsibility. Assault as a crime against humanity in violation of Art. 9(h) of Law 26/2000 using Art. 42(2).	3 years (14 August 2002).	Released pending appeal.	Charged with command responsibility for the acts of his subordinates in relation to the attack on Liquiça church on 6 April 1999; the attack on Manuel Carrascalão's house on 17 April 1999; and the attack on Suai Church on 6 September 1999. Indicted for crimes against humanity by the Office of the General Prosecutor in Timor-Leste.
Brigadier General Timbul Silaen	Chief of Police for East Timor (*Kepala Polisi Daerah*, Kapolda) (June 1998 – September 1999) Rank in 1999: Colonel (Pol)	Murder as a crime against humanity in violation of Art. 9(a) of Law 26/200 using Article 42(2) on civilian/police command responsibility. Assault as a crime against humanity in violation of Art. 9(h) of Law 26/2000 using Art. 42(2).	Acquitted (15 August 2002) Acquittal upheld by the Supreme Court (13 January 2004)	Currently serving as Chief of Police (Kapolda) for Papua Province. 2000 - Appointed as Head of Anti-Narcotics Unit at National Police Headquarters, and in 2001 simultaneously served as Deputy Governor of the National Police Academy. 1999 - Appointed Head of the Police Anti-corruption Force at the National Police Headquarters and promoted to Brigadier General.	Charged with command responsibility for the acts of his subordinates in relation to the attack on Liquiça church on 6 April 1999; the attack on Manuel Carrascalão's house on 17 April 1999; the attack on the UNAMET office in Liquiça on 4 September 1999; the attack on Dili Diocese on 5 September 1999; and the attack on the residence of Bishop Belo on 6 September 1999. Indicted for crimes against humanity by the Office of the General Prosecutor in Timor-Leste.

Lieutenant Colonel (Inf.) Endar Priyanto	District Military Commander for Dili / 1627 (*Komandan Daerah Militer*, Dandim) (September 1997 - 9 August 1999)	Murder as a crime against humanity in violation of Art. 9(a) of Law 26/200 using Art. 42(1) on military command responsibility. Assault as a crime against humanity in violation of Art. 9(h) of Law 26/2000 using Art. 42(1)	Acquitted (29 November 2002)	Released pending appeal	Charged with command responsibility for the acts of his subordinates in relation to the attack on Manuel Carrascalão's house on 17 April 1999.
Lieutenant Colonel (Inf) Soedjarwo	District Military Commander for Dili / 1627 (Dandim) (9 August 1999 – December 1999)	Murder as a crime against humanity in violation of Art. 9(a) of Law 26/200 using Art. 42(1) on military command responsibility. Assault as a crime against humanity in violation of Art. 9(h) of Law 26/2000 using Art. 42(1).	5 years (27 December 2002)	Released pending appeal Reportedly served in Kodim 1624 Flores Timur after leaving Timor-Leste.	Charged with command responsibility for the acts of his subordinates in relation to the attack on the Dili Diocese Compound on 5 September 1999, and the residence of Bishop Belo on 6 September 1999.

Eurico Barros Gomes Guterres	Aitarak Militia Commander and deputy commander of the Pro-Integration Forces (*Pasukan Pejuang Integrasi*, PPI)	Murder as a crime against humanity in violation of Art. 9(a) of Law 26/200 using Art. 42(2) on civilian/police command responsibility. Assault as a crime against humanity in violation of Art. 9(h) of Law 26/2000 using Art. 42(2).	10 years (27 November 2002)	Released pending appeal. Currently Chairman of the Red and White Defenders Front (*Front Pembela Merah Putih,* FPMP) December 2003 - Reportedly seeking to establish a FPMP chapter in Papua. April 2001- Sentenced to six months' imprisonment for inciting violence in West Timor. Released into house arrest in June 2001. August 2000 - Appointed head of Banteng Pemuda, a security group allegedly linked to the PDI-P (*Partai Demokrasi Indonesia – Perjuangan*). Stood as a Golkar (*Golongan Karya*) candidate in national elections in June 1999.	Charged with command responsibility for the acts of his subordinates in relation to the attack on Manuel Carrascalão's house on 17 April 1999. Indicted for crimes against humanity by the Office of the General Prosecutor in Timor-Leste.

Major General (Inf) Adam Rachmat Damiri	Regional Military Commander IX / Udayana (Panglima Daerah Militer, Pangdam) (June 1998 – November 1999)	Murder as a crime against humanity in violation of Art. 9(a) of Law 26/200 using Art 42(1) on military command responsibility. Assault as a crime against humanity in violation of Art. 9(h) of Law 26/2000 using Art. 42(1)	3 years (5 August 2003)	Released pending appeal. November 1999 - Appointed Assistant for Operations to the Chief of General Staff (*Asisten Operasi Kepala Staff Umum,* Asops Kasum TNI). In this capacity he is currently assisting in the military operations in Nanggroe Aceh Darussalam Province.	Charged with command responsibility for the acts of his subordinates in relation to the attack on Liquiça Church on 6 April 1999; the attack on Manuel Carrascalão's house on 17 April 1999; the attack on the Dili Diocese Compound on 5 September 1999; the attack on the residence of Bishop Belo on 6 September 1999; and the attack on Suai Church on 6 September 1999. Indicted for crimes against humanity by the Office of the General Prosecutor in Timor-Leste.
Brigadier General Suhartono Suratman	Commander, Military Resort 164/Wira Dharma (*Komandan Resort Militer*, Danrem) (June 1998 – 13 August 1999) Rank in 1999: Colonel (Inf)	Murder as a crime against humanity in violation of Art. 9(a) of Law 26/200 using Art. 42(1) on military command responsibility. Assault as a crime against humanity in violation of Art. 9(h) of Law 26/2000 using Art. 42(1).	Acquitted (22 May 2003)	August 1999 - Appointed Deputy Head of the Armed Forces Information Center (*Wakil Kepala Pusat Penerangan Markas Besar TNI*). Has reportedly aided the military in drafting the martial law decree for Aceh and continues to have an active role in running of military operations in the province.[130] August 1999 - Promoted to Brigadier General.	Charged with command responsibility for the acts of his subordinates in relation to the attack on Liquiça Church on 6 April 1999 and Manuel Carrascalão's house on 17 April 1999. Indicted for crimes against humanity by the Office of the General Prosecutor in Timor-Leste.

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[130] Human Rights Watch report, *Aceh Under Martial Law: Can these men be trusted to prosecute this war?*, 15 October 2003.

Brigadier General Mohammad Noer Muis	Commander, Military Resort 164/Wira Dharma (Danrem) (August 1999 – March 2000) Rank in 1999: Colonel	Murder as a crime against humanity in violation of Art. 9(a) of Law 26/200 using Art. 42(1) on military command responsibility. Assault as a crime against humanity in violation of Art. 9(h) of Law 26/2000 using Art. 42(1).	5 years (12 March 2003)	2001 – Served as Deputy Governor for the Military Academy in Magelang, Central Java Province. Reportedly promoted to Brigadier General in 2000.	Charged with command responsibility for the acts of his subordinates in relation to the attack on the Dili Diocese Compound on 5 September 1999; the residence of Bishop Belo on 6 September 1999; and the attack on Suai Church on 6 September 1999. Indicted for crimes against humanity by the Office of the General Prosecutor in Timor-Leste.
Colonel (Inf.) Yayat Sudrajat	Commander, Tribuana VIII Military Intelligence Unit (*Satuan Gabungan Intelijen,* SGI) / Kopassus. Rank in 1999: Lieutenant Colonel	Murder as a crime against humanity in violation of Art. 9(a) of Law 26/200 using Art. 42(1) on military command responsibility. Assault as a crime against humanity in violation of Art. 9(h) of Law 26/2000 using Art. 42(1).	Acquitted (30 December 2002)	2000 - Appointed assistant to the Kopassus General Commander and promoted to Colonel. Prior to this is reported to have held the post of Battalion Commander of Kopassus Group V (counter-terrorism)	Charged with command responsibility for the acts of his subordinates in relation to the attack on Liquiça Church on 6 April 1999. Indicted for crimes against humanity by the Office of the General Prosecutor in Timor-Leste.
Lieutenant Colonel (Pol) Hulman Gultom	Dili District Police Chief (*Kepala Polisi Resort, Kapolres*) (June 1998 – September 1999)	Murder as a crime against humanity in violation of Art. 9(a) of Law 26/2000 using Art. 42(2) on police/civilian command responsibility. Assault as a crime against humanity in violation of Art. 9(h) of Law 26/2000 using Art. 42(2).	3 years (20 January 2003)	September 2002 – Appointed Head of a sub-department in the national police detective unit (*Korps Reserse Kepolisian Republik Indonesia* (Koserse Polri) 2002 - Appointed deputy head of Bandung City Police (*Wakil Kepala Kepolisian Wilayah Kota Besar*, Wakapolwiltabes Bandung) 2000 – Head of East Bandung City Police Resort (*Kepala Kepolisian Resort Kota,* Kapolresta Bandung Timur)	Charged with command responsibility for the acts of his subordinates in relation to the attack on Manuel Carrascalão's house; the attack on the Dili Diocese Compound on 5 September 1999; and the attack on the residence of Bishop Belo on 6 September 1999. Indicted for crimes against humanity by the Office of the General Prosecutor in Timor-Leste.
Suai case					

Colonel (Inf) Herman Sedyono	Regent (*bupati*) of Covalima District, Timor-Leste (September 1994 – 7 September 1999)	Murder as a crime against humanity in violation of Art. 9(a) of Law 26/200 using Art. 42 on command responsibility. Murder as a crime against humanity in violation of Art. 9(a) of Law 26/200 using Art. 41 on attempting, plotting or assisting the perpetration of a violation.	Acquitted (15 August 2002) Acquittal upheld by the Supreme Court in March 2004	Reportedly working in the TNI Headquarters (*Markas Besar*, TNI, Mabes TNI)	Those charged in the Suai case were all charged with command responsibility for the acts of their subordinates in relation to the attack on Suai Church on 6 September 1999. All have been indicted for crimes against humanity by the Office of the General Prosecutor in Timor-Leste.
Colonel Czi. Lilik Koeshardianto	Commander, Suai District Military Command 1635 (*Komandan Distrik Militer,* Dandim) (29 August 1999 – 8 September 1999)	As above	Acquitted (15 August 2002)		As above
Lieutenant Colonel (Pol) Gatot Subiaktoro	Covalima (Suai) District Police Chief (*Kepala Polisi Resort,* Kapolres) (June 1998 – September 1999)	As above	Acquitted (15 August 2002)	2002 – Served as Blitar District Police Chief (*Kepala Polisi Resort,* Kapolres), East Java Province.	As above
Captain (Inf) Achmad Syamsuddin	Suai District Military Chief of Staff (*Kepala Staff Distrik Militer*, Kasdim 1635). (1 September 1998 – 12 September 1999)	As above	Acquitted (15 August 2002)		As above

Captain (Inf) Sugito	Commander, Suai Sub-district Military 1635 Command (*Komandan Koramil,* Danramil) (1992-1999) Rank in 1999: Lieutenant	As above	Acquitted (15 August 2002)		As above
Liquiça case					
Lieutenant Colonel (Inf) Asep Kuswani	Commander, Liquiça District Military 1636 Command (*Komandan Distrik Militer,* Dandim) (October 1997 – 1999)	Murder as a crime against humanity in violation of Art. 9(a) of Law 26/200 using Art. 42(1) and 42(2) on military and police/civilian command responsibility. Assault as a crime against humanity in violation of Art. 9(h) of Law 26/2000 using Art. 42(1) and 42(2).	Acquitted (29 November 2002)		Those charged in the Liquiça case have all been charged with command responsibility for the acts of their subordinates in relation to the attack on Liquiça Church on 6 April 1999. All have been indicted for crimes against humanity by the Office of the General Prosecutor in Timor-Leste.
Lieuenant Colonel (Pol) Adios Salova	Liquiça Police Chief (*Kepala Polisi Resort,* Kapolres) (January 1999 – July 1999)	As above	Acquitted (29 November 2002)		As above
Leoneto Martins	Regent (*Bupati*) of Liquiça District (1995 – September 1999)	As above	Acquitted (29 November 2002		As above